86-322

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CRAWFORD FITTING COMPANY,
CAPITAL VALVE & FITTING COMPANY, INC.,
THOMAS A. READ & COMPANY,
FRED A. LENNON and ROBERT D. JENNINGS,
Petitioners

v.

J. T. GIBBONS, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DANDO B. CELLINI *
VICTORIA L. KNIGHT
McGLINCHEY, STAFFORD, MINTZ,
CELLINI & LANG, PC
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200

ERNEST P. MANSOUR
MANSOUR, GAVIN, GERLACK &
MANOS CO., L.P.A.
2150 Illuminating Building
Cleveland, Ohio 44113
Telephone: (215) 523-1500
Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether or not district courts have any discretion under Fed. R. Civ. P. 54(d) to tax costs, such as expert witness fees, beyond the scope of those items listed in 28 U.S.C. § 1920.

PARTIES TO THE PROCEEDINGS

The parties to these proceedings are petitioners Crawford Fitting Company, Fred A. Lennon, Capital Valve & Fitting Company, R. D. Jennings and Thomas A. Read & Company, Inc. and respondent J. T. Gibbons, Inc.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Crawford Fitting Company, Capital Valve & Fitting Company, Inc., Thomas A. Read & Company, Fred A. Lennon and Robert D. Jennings respectfully pray that a writ of certiorari be issued to review the *en banc* decision of the United States Court of Appeals for the Fifth Circuit entered in this case on June 2, 1986.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Jurisdiction of the District Court was based upon Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26.

OPINIONS BELOW

The memorandum opinion of the District Court, reported at 102 F.R.D. 73 (E.D. La. 1984), is reprinted as Appendix A hereto. The May 17, 1985 opinion of a panel of the Fifth Circuit Court of Appeals, 760 F.2d 613 (5th Cir. 1985), is reprinted as Appendix B hereto. The June 2, 1986 *en banc* opinion of the Court of Appeals for the Fifth Circuit is reprinted as Appendix C hereto.

STATUTES INVOLVED

The statutes involved herein, 28 U.S.C. § 1920, 28 U.S.C. § 1821 and Rule 54(d) of the Federal Rules of Civil Procedure, are reprinted as Appendix E hereto.

STATEMENT OF THE CASE

Plaintiff filed this action in federal district court, claiming that petitioners engaged in numerous violations of the federal antitrust laws, 15 U.S.C. §§ 1 and 2, including a group boycott, horizontal and vertical price fixing, market allocation, predatory pricing, monopolization, and attempt and conspiracy to monopolize. The trial court directed a verdict in favor of defendants on all of plaintiff's claims, and entered judgment dismissing the complaint at plaintiff's cost. *J.T. Gibbons, Inc. v. Crawford Fitting Company, et al.*, 565 F. Supp. 167 (E.D. La. 1982). The Fifth Circuit Court of Appeals affirmed the trial court's rulings in all respects. *J.T. Gibbons, Inc. v. Crawford Fitting Company, et al.*, 704 F.2d 787 (5th Cir. 1983).

Defendants filed a Bill of Costs with the Clerk of Court, who taxed the costs for audio-visual equipment and assistance, copies of depositions, and daily trial transcripts. Not taxed as costs were expert witness fees, and attorneys' fees and expenses incurred in connection

with depositions taken by defendants in Scotland. After a *de novo* review, the district court awarded defendants those costs taxed by the Clerk, as well as some of defendants' expert witness fees, and attorneys' fees and expenses incurred in connection with the Scotland deposition. The court's award of expert witness fees as costs was based upon the "indispensability" rule recently developed by several circuit courts of appeals. Under this rule, a district court has discretion under Fed. R. Civ. P. 54(d) to award a prevailing party expert witness fees beyond the per diem and travel allowance for ordinary witnesses prescribed by 28 U.S.C. §§ 1920 and 1821, where the expert testimony was indispensable to the presentation of the case. 102 F.R.D. 73.

Applying the indispensability rule to the facts before it, the trial court made a factual finding that the testimony of two of the three expert witnesses used by defendants at trial was crucial and indispensable to the determination of the issues in the case. 102 F.R.D. at 86-87. It also found that, "It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where the defendants were forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims." 102 F.R.D. at 86. On appeal, a panel of the Fifth Circuit sustained the district court's award of costs, except that it reversed the award of expert witness fees in excess of the ordinary per diem and travel allowance prescribed by 28 U.S.C. §§ 1920 and 1821. 760 F.2d 613 (5th Cir. 1985). Subsequently, the Fifth Circuit *sua sponte* ordered a hearing *en banc*.

On the same date, it granted a rehearing *en banc* in *International Woodworkers of America, AFL-CIO and its Local No. 5-376*, 752 F.2d 163 (5th Cir. 1985) (hereinafter "*IWA*"). The prevailing defendant in *IWA*, an

employment discrimination suit, had requested expert witness fees as a litigation expense incidental to an award of attorneys' fees authorized by the Civil Rights Attorney's Fees Award Act, 42 U.S.C. § 1988. The district court found that that statutory provision did not authorize such an award, and a panel of the Fifth Circuit affirmed this ruling. 752 F.2d 163 (5th Cir. 1985). In a majority opinion authored by Judge Carolyn Dineen Randall, the *en banc* court in the *IWA* case, adopting by analogy the rule with respect to awards of attorneys' fees set forth in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), held that expert witnesses fees in excess of the per diem and travel allowance specified in § 1821 for ordinary witnesses are not generally taxable as costs.

On the same date, the Fifth Circuit applied its sweeping new rule herein, reversing the district court's award of expert witness fees to the prevailing defendants in excess of the amount allowed by 28 U.S.C. § 1821. It did so although the costs in the instant suit were sought on a completely different basis from that in the *IWA* case. The *IWA* case involved a request by a prevailing defendant for an award of expert witness fees incidental to an award of attorney's fees under the Civil Rights Attorney's Fee Award Act, 42 U.S.C. § 1988. In the instant case, the prevailing defendants in an antitrust case invoked the trial court's general discretion under Fed. R. Civ. P. 54(d) to recover costs, including expert witness fees. The *en banc* court applied the same rule to both cases without distinction.

REASONS FOR GRANTING THE WRIT

The justification for the issuance of a writ of certiorari herein is two-fold. First, the issue involved—the scope of a district judge's authority, if at all, to award costs beyond 28 U.S.C. § 1920—is an issue which arises in each

and every case that proceeds to judgment on the merits. The decisions of the federal circuit courts of appeals reflect that different rules have been formulated on this issue, which routinely confronts district judges across the country. The rule laid down by the Fifth Circuit herein comports with none of the rules so far enunciated. This Court should lay to rest the confusion among the circuits and adopt a uniform rule to be applied nationwide by all district courts.

Secondly, the issue presented involves an important question of federal policy, the resolution of which will have a significant impact upon the allocation of the costs of modern litigation in America. At a time when even the American rule prohibiting awards of attorneys' fees to prevailing parties has been called into question, it is particularly anamolous to deny district judges any discretion at all to include expert witness fees as taxable costs. Given the special concern which the legal profession and the lay community alike have lately focused upon the general attitudes toward litigation in this country, we respectfully suggest that this second factor is at least as compelling—and perhaps more compelling—than the traditional component of a clear conflict among the circuits. Taken together, they comprise special and important reasons for the issuance of the writ prayed for, as required by the Rules of this Honorable Court.

A. There Exist Numerous Direct Conflicts Among The Circuits On The Question Presented By This Petition.

The instant case involves the proper interpretation of two statutes, Fed. R. Civ. P. 54(d) and 28 U.S.C. § 1920. Fed. R. Civ. P. 54(d) provides that "[e]xcept when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs." 28 U.S.C. § 1920 reads as follows:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

The amount of "fees . . . for . . . witnesses," 28 U.S.C. § 1920(3), is limited to the minimal statutory per diem contained in 28 U.S.C. § 1821. *See* Appendix E.

The federal circuit courts of appeal have adopted a hodgepodge of different rules with respect to the discretion afforded a district judge under 28 U.S.C. §§ 1920, 1821 and Fed. R. Civ. P. 54(d) to award fees of expert witnesses beyond the parameters of 28 U.S.C. §§ 1920 and 1821. In his dissent to the majority ruling herein, Judge Alvin B. Rubin summarized the various rules as follows:

> The First Circuit has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.
>
> . . .

> The Third Circuit in the maritime tort case of *Roberts v. S.S. Kyriakoula O. Lemos*, expressly permitted the award of expert witness fees in a maritime tort case when the expert's testimony is indispensable to the determination of the case or played a crucial role in the resolution of the issues presented.
>
> . . .
>
> Our own circuit has permitted expert witness fees to be awarded not only under [42 U.S.C.] § 1988, but in cases of bad faith litigation, and when, after prior court approval, the testimony proved indispensable to the determination of the case.
>
> The Sixth Circuit has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to [42 U.S.C.] § 1988 attorney's fees, and awarding them instead pursuant to the court's sound discretion under § 1920 and Rule 54(d). The district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.
>
> The Eighth Circuit, like the Third, has permitted the award of expert witness fees. . . . Although it did so in an antitrust case arising under the Clayton Act, the court [held] that "Fed. R. Civ. P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821 [or § 1920]." It has reached the same result in cases not involving a fee-shifting statute.
>
> The Ninth Circuit permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to special circumstances. However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).

The District of Columbia Circuit has found no authority for a court to award excess expert witness fees but qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case."

Other circuits have denied the award of expert witness fees in excess of the amount allowed ordinary witnesses by 28 U.S.C. § 1821. The Second and Fourth Circuits have addressed the issue only in antitrust cases and have held, I believe incorrectly, that the Clayton Act's allowance of "cost of suit" does not permit awards in excess of § 1920 costs. The Seventh Circuit recognizes that courts "retain some discretion to tax costs not specifically provided for by statute", . . . but limits that discretion to unspecified "exceptional circumstances." Finally, the Tenth and Eleventh Circuits have categorically denied district courts the discretionary authority to award witness fees in excess of the amounts specified in § 1821, although they have not extended this limitation to § 1988 cases.

Appendix D at pp. 77a-81a (citations omitted).

The rule adopted by the *en banc* court below differs materially from any rule formulated thus far. It is borrowed wholesale from the so-called "American Rule" developed by this Court, which provides that attorneys' fees are awardable only when expressly authorized by Congress or when one of three narrow equitable exceptions applies.[1] *Alyeska Pipeline Service Co. v. Wilderness*

[1] The three narrow equitable exceptions apply where (1) the trustee of a fund or property, or a party in interest, preserved or recovered the fund for others in addition to himself; (2) a party acted in willful disobedience of a court order; or (3) the losing party acted in bad faith, vexatiously, wantonly, or for oppressive reasons.

Society, 421 U.S. 240 (1975). Thus, under the Fifth Circuit's new rule, expert witness fees, like attorneys' fees, are not awardable as costs in excess of 28 U.S.C. § 1920, except where Congress has expressly so authorized or when one of three equitable exceptions applies.

Judge Rubin in his dissenting opinion herein summarized the state of the law in this area as follows:

> In sum, six circuits permit the award of expert witness fees when the testimony is indispensable or when advance court approval is obtained. Two circuits categorically deny district courts any such authority under the Clayton Act, and two deny them any authority whatsoever under Rule 54(d) to award costs not provided for by statute. But none engrafts the *Alyeska* attorney's fee exceptions onto a rewritten § 1920.
>
> Appendix D at p. 81a.

The Fifth Circuit developed its new rule in the context of deciding whether 42 U.S.C. § 1988, which authorizes an award of attorneys' fees to a prevailing party in a civil rights case, implicitly includes an award of expert witness fees. As Judge Rubin noted in his dissent, the court below "applies that rule to the recovery of expert witness fees without considering the recoverability of other litigation expenses. And it applies that rule without distinction to two dissimilar cases in which the recovery of expert witness fees is sought on completely different bases." Appendix D at p. 59a. In *IWA*, a prevailing defendant in an employment discrimination suit requested expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by the Civil Rights Attorney's Fees Awards Act. 42 U.S.C. § 1988. In the instant case, the prevailing defendants in an antitrust suit, invoked the trial court's general discretion under Fed. R. Civ. P. 54(d) to recover costs, including the fees of expert witnesses.

Four judges concurred in the result in the *IWA* case and dissented from the majority opinion in the instant case. Writing for all four dissenters, Judge Rubin criticizes the majority opinion as illogical and inconsistent with every other circuit court decision on the issue.

The majority rule is premised in large measure on this Court's decision in *Henkel v. Chicago, St. Paul, Minnesota and Omaha Railway Co.*, 284 U.S. 444 (1932). That case held that expert witness fees were included within, and limited to, the per diem and travel allowances for ordinary witnesses in 28 U.S.C. §§ 600 (a) and (c) (precursors of 28 U.S.C. §§ 1920 and 1821). Conceding that the issue in *Henkel* was the same as that before the *en banc* court below, Judge Rubin correctly noted that the district court powers with which *Henkel* dealt have altered since the date of that decision. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure, and thus before the merger of actions at law and equity. At that time, courts sitting in law had no power to award costs not expressly granted by statute. In equity, courts have always retained the power to award costs not specified by statute. With the merger of law and equity under the Federal Rules of Civil Procedure, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. Appendix D at pp. 74a-75a. The majority acknowledges this equitable power to the extent that it recognizes three equitable exceptions to its rule. There is no rational basis for its acknowledgement of this power in three narrow circumstances, but in no others.

Since the adoption of Rule 54(d), this Court has only once addressed the district courts' power to tax costs in excess of those specified in § 1920. In *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), the district court refused to tax as costs litigation expenses for witness travel and overnight transcripts. Although it affirmed

the disallowance, the Court declined to rest its decision on a determination that § 1920 did not expressly permit these costs. Instead, it relied on Rule 54(d), saying:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. . . . [T]he discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.
>
> 379 U.S. at 235.

As Judge Rubin concisely comments in his dissent below, the "Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion [albeit sparing] to award costs not enumerated in § 1920." Appendix D at p. 77a.

Other Circuit Courts have reached the same conclusion. In *Paschall v. Kansas City Star Co.*, 695 F.2d 322 (8th Cir. 1982), *rev'd on rehearing on other grounds*, 727 F.2d 692 (8th Cir. 1984), the Eighth Circuit Court of Appeals held that the language from *Farmer* quoted above "authorizes district judges to award costs not specifically enumerated in 21 U.S.C. § 1821." 695 F.2d at 338. Thus, the rule in the Eighth Circuit is that district courts have discretion to award expert witness fees as costs when expert testimony is "crucial" or "indispensable" to the determination of the case. *Id.* at 339. *Paschall* was a complex antitrust lawsuit, as is the instant case. The Court in *Paschall* found that the expert testimony concerning competitive impact was "the most important issue" in the case, and affirmed an award of expert witness fees as costs. *Id.*

Reading the *Farmer* opinion in the same way as the Eighth Circuit, the Third Circuit Court of Appeals also

recognized an "indispensability" rule in *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir. 1981). After quoting the language from *Farmer* relied on by the Eighth Circuit in *Paschall*, the Third Circuit reached the following conclusion in *Roberts*:

> *Farmer* appears to hold that Rule 54(d) authorizes district judges to exercise discretion—albeit "sparing"—to award costs not specifically enumerated in § 1821. The Court seems concerned to avoid taxation of unnecessary and possibly vexatious costs accumulated by a prevailing party. Hence the reference to a national policy in favor of restrained award of costs. It is important to note that the Court based its interpretation of Rule 54(d) not on a *Henkel*-type theory of statutory preclusion of costs not listed in § 1821, but on policy considerations militating against award of unenumerated costs. A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expenditures necessary to the litigation. While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to ensure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures. We therefore agree with the District of Minnesota and the Eighth Circuit that *Farmer* affords a district court equitable discretion to award expert witness fees when the expert's testimony is indispensable to determination of the case. 651 F.2d at 206.

It is respectfully submitted that the rule adopted by the majority below, which denies district courts any discretion to tax costs outside of § 1920, is contrary to law and renders "Rule 54(d) . . . completely redundant, without any independent force or meaning." Appendix D at p. 74a.

B. The Instant Petition Addresses Critical Policy Issues Regarding Allocation of the Enormous Costs of Modern Litigation in Federal Courts.

Judge Rubin's dissent below squarely acknowledges the important public policy implications of the issue raised by this case. He observed that:

> [T]he costs of litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims, especially those raised in . . . antitrust cases. [E]xpert witness testimony controls the outcome in two-thirds of all cases, and . . . are second only to attorneys' fees as the largest litigation expense.
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> Appendix D at p. 82a.

In a 1976 address to the Ninth Circuit Judicial Conference, Francis Kirkham opined that "litigation is the new growth industry." F. Kirkham, *Complex Civil Litigation "Have Good Intentions Gone Awry?,"* 70 F.R.D. 199, 204 (1976). The relevant figures since then seem to have borne him out. In 1968 there were about 71,000 civil cases filed in the federal courts. By 1977, the number had risen to 130,000; by 1980 it was 180,000, and by 1984, the figure was 261,485. ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1984). The latest statistics show that 278,793 civil cases were filed in 1985. FEDERAL JUDICIAL WORKLOAD STATISTICS, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1985).

Considerable commentary has been devoted to analyzing why the legal system in the United States seems to spawn so much more litigation than other legal systems around the world, and the explanations have ranged so far afield that even a genetic predisposition among Amer-

icans toward litigation has been suggested. Among practitioners of the law, however, it is well known that the litigation engine is principally fueled by a volatile mixture of a large number of lawyers, the legality of contingency fee agreements and the so-called "American Rule," which requires each litigant to bear the cost of his own attorneys' fees, win or lose. The impetus this blend gives to the filing of tenuous claims is readily apparent in the burgeoning field of complex business litigation. As one commentator has noted, "Business managers consider litigation a business activity like any other, and engage their company in litigation only if they expect that it will produce a good return or avert a bad return." T. Shreve, *Attorneys' Fee Awards to Complex Litigation Defendants: Striking a Balance*, 77 Nw. L. Rev. 818, 830 (1983). In deciding whether or not to press a claim such as the one brought against petitioners herein, a business manager goes through the normal process of a cost/benefit analysis, weighing the potential risks against the potential returns. Traditionally, the potential risks have been virtually nonexistent. Under the normal contingency fee agreement, the plaintiff is only responsible for routine expenses, which comprise a very small part of the total expenditures involved in pursuing complex litigation. On the other hand, the potential rewards can be astronomical, especially in antitrust cases, where the actual damages awarded are automatically trebled. The incentives are therefore great to pursue even the most marginal of claims.

The antitrust lawsuit which gave rise to the instant petition typifies these problems. As the trial court below observed in its opinion granting directed verdicts for petitioners, the plaintiff in this action asserted that petitioners had committed virtually every offense proscribed by the Sherman Act, including group boycott, refusal to deal, horizontal and vertical price fixing, illegal data dissemination, horizontal and vertical allocation of territories, predatory pricing, and conspiracy and attempt to monopolize.

Although the law provides that the plaintiff bears the burden of proof on each element of its claims, every trial lawyer knows that the average jury assumes the full majesty of the law could not possibly be brought into play unless there is a strong likelihood that someone had done something wrong. Moreover, in complex litigation such as antitrust cases, the defense lawyer cannot rely on the jury's instincts for what is right to yield the correct result, because virtually all of the testimony is likely to relate to matters that are entirely beyond the ken of the average juror. Thus, in a case which presents doubtful claims from a legal point of view, the plaintiff's lawyer must focus on getting the case to the jury for a decision (where he knows the marginal nature of the claim will not be at all apparent), and the defense lawyer must concentrate on presenting so complete a case that the judge will feel that it is his obligation to direct a verdict.

Often, extensive expert testimony is the only way for the defense to conclusively demonstrate that a directed verdict is appropriate as a matter of fact and law. For example, respondent herein made bald allegations charging petitioners with violations of § 1 and § 2 of the Sherman Act. Dr. Thomas Saving, an expert economist, was retained by petitioners to analyze the relevant industry. Not only did he testify that the industry is extremely competitive, with very low entry barriers, but he also found that petitioner Crawford Fitting Company "has a small segment in the industry and completely lacks market power." 565 F. Supp. 167 at 180. Dr. Philip Robers, a supply and transportation expert for petitioners, was called to testify with respect to plaintiff's claim that it had been boycotted. After conducting an exhaustive study of plaintiff's purchase orders, invoices, shipping orders and other relevant documents, Dr. Robers reached the following conclusions: first, it was clear that plaintiff had never in fact been boycotted because it always had access to as much of the product as it wanted through an alternate source; and second, the plaintiff's own rec-

ords demonstrated conclusively that this alte nate source furnished the product at better prices, and with superior delivery times, than plaintiff had received from petitioner Crawford. 102 F.R.D. at 86-87.

After hearing all of the testimony, the trial court granted directed verdicts on all counts for petitioners and, in its opinion awarding costs to petitioners, specifically described the panoply of charges brought by plaintiff Gibbons as "an extremely burdensome, vexatious, and totally meritless array of antitrust claims." *Id.* at 86. The Fifth Circuit Court of Appeals affirmed the trial judge's directed verdict rulings in all respects. Noting that this litigation had been brought basically as a refusal to deal case, even though it was undisputed that the plaintiff always had access to the product involved, the Fifth Circuit specifically observed that "[t]he *sine qua non* of the injury caused by a refusal to deal would be inability to obtain the product." 704 F.2d 787 at 792.

Nonmeritorious cases of this kind are routinely pursued in our legal system because an objective cost/benefit analysis makes them attractive. The United States has the highest ratio of lawyers per capita of any nation in the world, so there is an abundance of attorneys willing to press dubious causes. The legality of contingency fee arrangements, which are forbidden in many other countries, effectively eliminates funding concerns. And finally, there is the "American rule." No other legal system in the world requires the winner in litigation to pay his own expenses. *See* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 Cal. L. Rev. 792, 798 (1966). But that has been historically the rule in this country, where a successful defendant is generally limited to recovering nothing more than routine court costs.

Taken together, these factors permit plaintiffs to bring marginal lawsuits at very low risks. Indeed, they clearly encourage the filing of such suits. Petitioners submit

that the litigation explosion which has troubled both the legal profession and the lay community is, in large measure, attributable to the confluence of these factors. The "indispensibility rule" adopted by the Third and Eighth Courts of Appeals is an intelligent and effective restraint against gross abuses which can be effectuated without the sweeping policy changes which would be required to alter the now firmly entrenched American Rule. The "indispensability rule" is neither drastic nor automatic: it gives content to the language of Fed. R. Civ. P. 54(d) and allows district courts the discretion to award expert witness fees in appropriate circumstances. Such a rule would have the salutary effect of giving the potential plaintiff with a dubious claim at least a moment's pause to consider the increased risks before leaping into the litigation arena.

CONCLUSION

A clear conflict among the circuits exists—that much cannot be gainsaid. Indeed, it is more accurate to say that the circuits are in disarray on the question presented here. Can this conflict fairly be characterized as the type of "tolerable conflict" alluded to by the Honorable Chief Justice Burger during the course of the proceedings of the 1984 Judicial Conference of the District of Columbia Circuit? *Proceedings of Forty-Fifth Judicial Conference of the District of Columbia Circuit*, 105 F.R.D. 251, 260 (1984).

It is petitioners' belief that this question must be answered in the negative. Admittedly, there is a temptation to regard questions such as that presented by the instant petition as administrative rather than substantive in character—and hence less urgent. Such a distinction is too facile, for it is precisely questions of this kind that set the underlying tone and tempo of a nation's judicial system. Resolution of the question presented herein will affect every United States district court in the nation, and virtually every litigant or prospective litigant in

those courts. In petitioners' view, the doctrine of tolerable conflicts is inapplicable to issues of such far-reaching practical importance. Petitioners therefore urge this Honorable Court to issue a writ of certiorari to review the decision of the Fifth Circuit Court of Appeals entered on June 2, 1986 in this matter.

Respectfully submitted, this 29th day of August, 1986.

DANDO B. CELLINI *
VICTORIA L. KNIGHT
McGLINCHEY, STAFFORD, MINTZ,
CELLINI & LANG, PC
643 Magazine Street
New Orleans, Louisiana 70130
Telephone: (504) 586-1200

ERNEST P. MANSOUR
MANSOUR, GAVIN, GERLACK &
MANOS CO., L.P.A.
2150 Illuminating Building
Cleveland, Ohio 44113
Telephone: (215) 523-1500
Attorneys for Petitioners

* Counsel of Record

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-3332

J. T. GIBBONS, INC.,
Plaintiff-Appellant,

v.

CRAWFORD FITTING COMPANY, et al.,
Defendants-Appellees.

Filed June 2, 1986

Before: Clark, Chief Judge, Goldberg, Gee, Rubin, Reavley, Politz, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.*

Opinion by Judge Carolyn Dineen Randall; Dissent by Judge Alvin B. Rubin, with whom Goldberg, Johnson and Williams join.

Appeal from the United States District Court for the Eastern District of Louisiana
Edmund L. Palmieri, District Judge
(Sitting by Designation), Presiding

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

This case involves the application of the rule announced today in *International Woodworkers of America, AFL-*

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* Due to his death on March 27, 1986, Judge Albert Tate, Jr. did not participate in this decision.

CIO, CLC and its Local No. 5-376 v. Champion International Corporation, No. 83-4616 (5th Cir. June 2, 1986). The plaintiff, J.T. Gibbons, Inc. ("Gibbons"), brought suit against the defendants, Crawford Fitting Company, and others (collectively "Crawford"), alleging antitrust violations. At the conclusion of the evidence, the district court directed a verdict against Gibbons, 565 F. Supp. 167, which was affirmed by a panel of this court on appeal. 704 F.2d 787. Crawford, on behalf of all defendants, filed a Bill of Costs with the District Clerk. The Clerk taxed all costs requested by Crawford with the exception of certain expert witness' fees, and attorneys' fees and expenses incurred in connection with a deposition taken by Crawford in Scotland. Both Gibbons and Crawford contested the Clerk's assessment of costs in the district court. Following a hearing, the district court altered the Clerk's assessment and awarded Crawford over $151,000, including expert witness' fees, and attorneys' fees and expenses for the Scotland deposition. 102 F.R.D. 73.

A panel of this court sustained the district court's award of costs to Crawford for audio-visual equipment and assistance; for copies of depositions noticed by Gibbons; for daily trial transcripts; and for Crawford's expenses and attorneys' fees in connection with the Scotland deposition. 760 F.2d 613. The panel opinion, however, reversed the district court's award of expert witness' fees in an amount greater than that prescribed by 28 U.S.C. § 1821. This court voted to rehear the case en banc, thereby vacating the panel opinion. *See* Fifth Circuit Local Rule 41.3.

At the outset, we reinstate Parts I through III of the panel opinion.[1] The remainder of the panel opinion, Part IV, is superseded in its entirety by this opinion.

[1] Part III(b) of the panel opinion, addressing the district court's award of costs for daily trial transcripts and transcript copies of depositions, cites *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982), (*Copper Liquor III*), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), overruled in part in *International Woodworkers of America, ante*. The cited portion of *Copper Liquor III* indicates that the costs for transcript copies of depositions are recoverable under 28 U.S.C. § 1920(2). Section 1920(2) literally provides for recovery of the "fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case." In *United States v. Kolesar*, 313 F.2d 835, 837-38 (5th Cir. 1963), we held that "[t]hough § 1920(2) does not specifically mention a deposition, we agree with prior decisions suggesting that depositions are included by implication in the phrase 'stenographic transcript.'" Thus we reinstate the panel's reliance on a portion of *Copper Liquor III* not reversed by us stating that costs for transcript copies of depositions may be recoverable under § 1920(2) if "necessarily obtained for use in the case."

After consideration of the principles set forth in *International Woodworkers of America*, we reverse the district court's award of witness' fees in excess of the amount allowed by 28 U.S.C. § 1821. 15 U.S.C. § 15[2] provides for the award of attorneys' fees and the costs of suit to a prevailing plaintiff. Crawford, as a prevailing *defendant*, cannot fit within this statute. In addition, we agree with the Second, Sixth and Seventh Circuits that 15 U.S.C. § 15 does not authorize the taxing of excess expert witness' fees as costs. *See Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 309 n.75 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir. 1975); *State of Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 864-65 (7th Cir. 1981). As discussed in *International Woodworkers of America, ante*, Congress knows full well how to provide for the recovery of excess expert witness' fees as costs.

[2] 15 U.S.C. § 15 provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

That Congress did not do so in 15 U.S.C. § 15 is clear. To the extent that *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), held otherwise, it is overruled. Crawford does not claim an exception to the American Rule. We thus reverse the district court's assessment of expert witness' costs and remand to the district court for reassessment of costs consistent with this opinion.

REVERSED and REMANDED.

ALVIN B. RUBIN, Circuit Judge, with whom GOLDBERG, JOHNSON, and WILLIAMS, Circuit Judges join, dissenting, for the reasons set forth in Judge Rubin's opinion concurring in the result of *International Woodworkers of America, AFL-CIO, CLC and its Local No. 5-376 v. Champion International Corporation*, No. 83-4616 (5th Cir. June 2, 1986).

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-3332

J.T. GIBBONS, INC.,
Plaintiff-Appellant,

v.

CRAWFORD FITTING COMPANY, *et al.*,
Defendants-Appellees.

May 17, 1985

Sessions, Fishman, Rosenson, Boisfontaine & Nathan, New Orleans, La. Joseph L. Alioto, John I. Alioto, Lawrence G. Papale, Alioto & Alioto, San Francisco, Cal., for plaintiff-appellant.

McGlinchey, Stafford & Mintz, Dando B. Cellini, New Orleans, La., for Crawford Fitting and Lennon.

Ernest P. Mansour, Cleveland, Ohio, Victoria L. Knight, New Orleans, La., for Crawford.

Dale, Owen, Richardson, Taylor & Mathess, Thomas E. Balhoff, Baton Rouge, La., for Capital Valve & Fitting Co.

Charles E. Hamilton, III, New Orleans, La., for Thomas Read & Co.

Appeal from the United States District Court
for the Eastern District of Louisiana

Before GOLDBERG, TATE and JOLLY, Circuit Judges.

PER CURIAM:

Following the successful defense of an antitrust action, the defendant was awarded as costs of the litigation over $151,000, including more than $86,000 for expert witness fees. Because we find the award of expert witness fees to be in error, we reverse in part and remand.

I

The plaintiff, J.T. Gibbons, Inc. (Gibbons), brought suit against the defendants Crawford Fitting Company, and others (Crawford), alleging antitrust violations of sections 1 and 2 of the Sherman Act. At the conclusion of the evidence, the district court directed a verdict against Gibbons, 565 F.Supp. 167, which was affirmed by a panel of this court on appeal. 704 F.2d 787. Crawford, on behalf of all defendants, then filed a bill of costs with the district clerk. The clerk taxed all costs requested by Crawford, with the exception of certain expert witness fees and attorneys' fees and expenses incurred in connection with a deposition taken by Crawford in Scotland. Both Gibbons and Crawford contested the clerk's assessment of costs in district court. Following a hearing, the district court altered the clerk's assessment and awarded Crawford over $151,000, including expert witness fees, and attorneys' fees and expenses for the Scotland deposition. 102 F.R.D. 73. Gibbons now appeals.

II

Our primary reason for writing today is to address the question whether a district court may allow as costs

ot a lawsuit expert witness fees in excess of the statutory maximum provided in 28 U.S.C. § 1821. Gibbons has also taken issue with several other items of costs taxed by the district court. Because those issues involve well settled principles of law, we will briefly address each before considering the district court's assessment of expert witness fees.

III

A.

The first contested issue concerns costs awarded to Crawford for audiovisual equipment and assistance. The district court disallowed costs for the preparation of certain charts, but allowed the expenses incurred in connection with the operation of projection equipment, reasoning that the court's specific request for this equipment was tantamount to pretrial authorization. Gibbons argues that the district court did not formally authorize the audiovisual equipment prior to trial and did not provide Gibbons the necessary notice to make a formal objection to the use of the particular equipment. Gibbons also contends that the cost of the equipment, totalling $18,494.24, was unreasonable because similar equipment could have been procured at less expense.

It is settled that costs for charts, models and photographs may be taxed as costs only if there is pretrial authorization by the trial court. *Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 133 (5th Cir. 1983); *Johns Manville Corp. v. Cement Asbestos Products Co.*, 428 F.2d 1381, 1385 (5th Cir.1970). Here the record reflects that prior to trial the district court requested the audiovisual equipment which, in fact, was used by both Gibbons and Crawford. Although the costs of the projection equipment and technical assistance might appear to be excessive, the district court had prior experience with the use of this special equipment and found it to be necessary and reasonable in conducting

such complex and lengthy antitrust litigation as that before it. The record does not reflect that the district court abused its sound discretion in taxing these expenses as costs.

B.

Gibbons also contests the costs awarded to Crawford for copies of depositions noticed by Gibbons and costs of daily trial transcripts. Gibbons argues that Crawford is not entitled to recover for the deposition copies because the depositions were noticed by Gibbons and because the copies were obtained merely for Crawford's convenience. Gibbons also contends that the cost of daily trial transcripts should not have been taxed because they also were primarily for Crawford's convenience and were not necessary for use in the case.

It is well established in this circuit that the cost of copies of deposition transcripts is taxable only if the copies were necessary for use in the case. *Eastman Kodak*, 713 F.2d at 133; *Copper Liquor, Inc. v. Adolph Coors*, 684 F.2d 1087, 1099 (5th Cir.1982). The same standard applies to awards of costs for daily trial transcripts. *Copper Liquor*, 684 F.2d at 1099; *United States v. Kolesar*, 313 F.2d 835, 840 (5th Cir.1963). The district court here found that the daily trial transcripts were necessary for use in the case, and we are convinced that the court was within its discretion. Furthermore, we can find no compelling reason, certainly in this case, to distinguish, as far as costs for copies are concerned, between depositions noticed by an unsuccessful litigant as opposed to a prevailing party. We therefore affirm the district court's award of costs to Crawford for transcript copies of depositions noticed by Gibbons and daily trial transcripts.

C.

Gibbons also appeals the taxing of costs for Crawford's travel expenses and attorney's fees incurred in connection with a deposition taken in Scotland. The district

court based the award upon its general equitable powers, finding bad faith and vexatiousness concerning Gibbons' failure to comply with a discovery order that made the Scotland depositions necessary.

The facts underlying the district court's award can be briefly summarized. Crawford sought to depose two principals of Hydrasun (Aberdeen), Ltd., a Scottish corporation, who allegedly had knowledge of facts concerning the losses claimed by Gibbons. To limit expenses, Crawford had agreed to make one of its Scottish distributors available in the United States in exchange for Gibbons' commitment to make the Hydrasun principals, who resided in Scotland, available to Crawford, in the United States. The Scottish distributor was deposed by Gibbons pursuant to the agreement, but despite repeated attempts by Crawford, Gibbons failed to make available the Hydrasun principals. Crawford then obtained a court order directing Gibbons to make the principals available in the United States pursuant to the original agreement. The principals later appeared in the United States, but their depositions were not completed because they insisted on leaving early for personal reasons. During these depositions, Crawford became aware that the principals had been in the United States to confer with Gibbons prior to the court's order, but were not made available to Crawford at the time. Crawford then requested a hearing before a magistrate who ordered that Crawford be afforded a full and fair opportunity to depose the principals in Scotland and examine documents. Pursuant to the magistrate's order, Crawford sent three attorneys to Scotland to take the depositions, but the principals refused to disclose certain business documents they considered confidential. The scheduled depositions concluded with no testimony taken and no documents produced.

As a general rule attorney's fees and travel expenses incurred in connection with deposition taking, are not usually taxable as costs. 4 J. Moore, W. Taggart & J.

Wicker, *Moore's Federal Practice* ¶ 26.82 (2d ed. 1983). Under circumstances evidencing bad faith, vexatiousness, or oppressiveness, however, an award of such costs may be made under the court's general equitable power. *See Hall v. Cole*, 412 U.S. 1, 5, 93 S.Ct. 1943, 1946, 36 L.Ed. 2d 702 (1973); *United States v. Bexar County*, 89 F.R.D. 391, 394 n. 5 (W.D.Tex.1981); 4 *Moore's Federal Practice* at ¶ 26.82; 6 *Moore's Federal Practice* at ¶ 54.77[2]. In this case the district court expressly found that Gibbons acted vexatiously and in bad faith. The record clearly supports the district court's findings. Gibbons, in fact, completely failed to defend against or even dispute the facts upon which the court's findings were based. We therefore affirm the district court's award of these costs under its general equitable power.

IV

The final and most important issue is the taxing of expert witness fees. The Supreme Court long ago established as a general rule that expert witness fees are not taxable as costs beyond the statutory per diem fee, mileage, and subsistence allowance provided in 28 U.S.C. § 1821. *Henkel v. Chicago, St. Paul, Minnesota, and Omaha Ry Co.*, 284 U.S. 444, 446, 52 S.Ct. 223, 224-25, 76 L.Ed. 386 (1932). The district court here, in a thoughtful and carefully considered opinion, however, decided that the Court modified the general rule when it stated that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 234-35, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964). The Third and Eighth Circuits have interpreted *Farmer* to accord a district court equitable discretion to award expert witness fees when an expert's testimony is "indipensable" to the determination of the case. *See Paschall v. Kansas City Star Co.*,

695 F.2d 322, 338-39 (8th Cir.1982); *Roberts v. S.S. Kyriakoula L. Lemos*, 651 F.2d 201, 206 (3d Cir.1981). The district court, although recognizing that this circuit, unlike the Third and Eighth circuits, had not formally adopted the indispensability rule, believed that the door to the adoption of this rule had been opened in *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982). In *Copper Liquor*, we stated

> Expert witnesses generally may be allowed only the fees allowed "fact witnesses," as prescribed by 28 U.S.C. § 1821. Courts of appeal have approved trial court discretion to award the full fee charged by the expert in exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case. If counsel plan to seek allowance of the entire expert's fee, the better practice is to seek court approval before calling the expert witness. The court should consider these factors if counsel seek an allowance for experts in excess of the fee allowed for fact witnesses.

Id. at 1100 (footnotes omitted).

Although this statement in *Copper Liquor*, which is unquestionably dictum, suggests that expert witness fees may be recoverable in certain circumstances, we are compelled to hold otherwise.[1] Like the panel in *Copper Liquor*, we are bound by a prior decision of this court, decided after *Farmer*, that held courts have no authority outside 28 U.S.C. § 1821 to award as costs expert witness fees. *Burgess v. Williamson*, 506 F.2d 870, 879 (5th Cir.

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[1] Even if *Copper Liquor* was controlling and did permit the taxing of expert witness fees, our decision would be no different because Crawford did not seek court approval of the experts' entire fees before calling its expert witnesses. *See Copper Liquor*, 684 F.2d at 1100.

1975); *see also Baum v. United States*, 432 F.2d 85, 86 (5th Cir.1970).[2]

In conclusion we affirm the district court's assessment of all costs except those representing expert witness fees and remand to the district court for a reassessment of costs consistent with this opinion.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

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[2] Our decision today is not inconsistent with this court's opinion in *Jones v. Diamond*, 636 F.2d 1364, 1384 (5th Cir. 1981) (en banc). In *Jones*, we held that recovery of expert witness fees above the statutory maximum is permitted in civil rights case because of Congress' intent to apply a different rule in such cases and because civil rights plaintiffs, particularly prison inmates who are almost always indigent, would be unable to bring suit without the ability to recover expert's fees. *Id.* These unique considerations have no application in most civil cases such as the one here.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

Civ. No. 79-1127

Section J

J.T. GIBBONS, INC.,
Plaintiff,

—against—

CRAWFORD FITTING COMPANY, *et al.*,
Defendants

MEMORANDUM OPINION

PALMERI, J.

I. BACKGROUND

These cross motions deal with the allowance and disallowance of costs in an antitrust action. The action in question, brought under sections one and two of the Sherman Act, was tried to a jury from November 2, 1981, to November 19, 1981. At the end of the entire case, a directed verdict was entered in favor of defendants on all of plaintiff's claims. Defendants' counterclaim for malicious prosecution, alleging that plaintiff's suit was part of a scheme to wrongfully extort a distributorship from defendant Crawford Fitting Co. ("Crawford"), was submitted to the jury. The jury returned a verdict in favor of plaintiff on the counterclaim.[1] On November 24, 1981,

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[1] The jury answered "yes" to the following interrogatory: "Did Gibbons bring this lawsuit in good faith after full disclosure of the facts within the knowledge of Messrs. Richard and Cecil Keeney to their attorneys?"

judgment was entered dismissing plaintiff's complaint with costs to defendants and dismissing the counterclaim without costs. On December 28, 1981, defendants' motion for judgment notwithstanding the verdict or new trial on the counterclaim was denied.[2]

On May 9, 1983, the Fifth Circuit unanimously affirmed this Court's ruling in all respects. *J.T. Gibbons v. Crawford Fitting Co.*, 704 F.2d 787 (5th Cir.1983). The deadline for petitioning the United States Supreme Court for writs of certiorari passed without the filing of a petition by any party on August 8, 1983, and the judgment entered on November 24, 1981, in defendants' favor became final.

On November 30, 1983, defendant Crawford, on behalf of all defendants, filed its bill of costs, together with a supporting memorandum and documentation. At a hearing before the Clerk of the Court for the Eastern District of Louisiana on December 9, 1983, at which no one appeared on behalf of plaintiff, all costs requested by defendants were taxed with the exception of expert witness fees and attorneys' fees and expenses incurred in connection with a discovery trip to Scotland. The total costs taxed were $57,480.70. The amount of costs denied was $150,480.70.

On December 15, 1983, plaintiff filed a motion to review costs. Plaintiff's motion requests the setting aside of the full amount of costs taxed against it on the grounds (1) that the award of costs was barred under the doctrine of res judicata and collateral estoppel and (2) that defendants' bill of costs was not timely filed. In addition,

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[2] This Court filed two opinions—one granting the defendants' motion for a directed verdict and one denying defendants' motion for judgment notwithstanding the verdict on the counterclaim. *J.T. Gibbons, Inc. v. Crawford Fitting Co., Inc.*, 565 F.Supp. 167 and 186 (E.D. La. 1981).

plaintiff specifically challenges the costs taxed by the clerk for charts, audio-visual aids and transcripts.

On December 16, 1983, defendants filed a motion for review of costs, requesting this Court to exercise its discretion to award the costs denied by the clerk.

II. DISCUSSION

A. *Plaintiff's Motion for Review of Costs*

1. Res judicata and collateral estoppel

Plaintiff contends that principles of res judicata and collateral estoppel preclude the awarding of *any* costs to defendants. Plaintiff claims that the amount sought by defendants as costs was included in defendants' $1,760,000 claim for damages in the counterclaim. Since the jury found against the defendants on the counterclaim, plaintiff argues that defendants may not now "relitigate" the issue of their entitlement to these costs. Plaintiff's argument is frivolous.

In the judgment entered on November 24, 1981, and the decision granting defendants' motion for directed verdict filed on December 4, 1981, the Court dismissed plaintiff's complaint and exercised its discretion under Fed. R. Civ. P. 54(d) to award defendants the costs incurred in defending a legally baseless antitrust suit. Nothing in the decision denying defendants' motion for judgment notwithstanding the verdict on the counterclaim contradicted this directive. In effect, plaintiff now asserts that this Court erred in granting defendants their costs in the main case.

Plaintiff's brief is repleat with decisions enumerating the general principles of res judicata and collateral estoppel. Not one of these decisions applies the doctrines of res judicata or collateral estoppel to deny a litigant its costs. The reason for this is that the doctrines of res judicata and collateral estoppel have no applicability to the issue of costs.

It is true that the doctrine of res judicata percludes a litigant from relitigating issues that were or could have been raised in an earlier action. Here, however, defendants are not "relitigating" anything. No new lawsuit has been filed. Defendants have simply filed a bill of costs pursuant to this Court's order, entered under Fed. R. Civ. P. 54(d), allowing the defendants their costs in the antitrust action. The principles of res judicata have no applicability under such circumstances.

Defendants have not "split" any cause of action. Nothing precluded defendants from excluding the amount requested as costs from the counterclaim and claiming this amount in a separate bill of costs. Moreover, this court is aware of no reason why defendants could not have refrained from filing a counterclaim, collected their costs upon the successful conclusion of the antitrust action and then filed a malicious prosecution lawsuit against plaintiff for their other expenses. The fact that defendants chose to include their demand for costs, as well as other expenses, in their counterclaim, upon which the jury found against them, does not deprive defendants of their entitlement to a discretionary award of costs under Fed. R. Civ. P. 54(d) in the main case. The jury had no power to deprive defendants of this right.[3] Additionally, it is noteworthy that the damages sought by the defendants on their counterclaim far exceeded any costs in the case. They sought reimbursement of legal expenses incurred by them up to that point and which exceeded one and one-half million dollars.

In short, plaintiff's contention that principles of res judicata and collateral estoppel preclude an award of any costs to defendants in this case is nothing short of frivolous.

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[3] The counterclaim was submitted to the jury on the same evidence as that on which the Court based its decision to grant directed verdicts on the antitrust claims. The presentation of the counterclaim involved no additional evidence.

2. Timeliness of bill of costs

Plaintiff claims that defendants' delay in filing its bill of costs completely bars taxation of costs against plaintiff. Plaintiff argues that to permit defendants to recover costs now would violate the directive of Fed. R. Civ. P. 1 that the Federal Rules "be construed to secure the just, *speedy*, and inexpensive determination of every action." (Emphasis added). Plaintiff further contends that it has been prejudiced by the filing of the bill of costs at this time.

Judgment was entered in this case on November 24, 1981. The Fifth Circuit rendered its opinion of affirmance on May 9, 1983, and the deadline for the filing of a petition for certiorari passed on August 8, 1983. The bill of costs herein was filed on November 30, 1983.

Rule 54(d) does not place any time limits upon the filing of a bill of costs, and the determination of whether the taxation of costs in a particular case is time-barred lies entirely within the discretion of the trial court. It is true that Rule 54(d) must be interpreted in light of the mandate of Rule 1 that the Federal Rules be construed to secure the just, *speedy*, and inexpensive determination of every action. Thus, a delay in the filing of a bill of costs which the trial court determines to be unreasonable would lead to the denial of the taxation of costs. This, however, is not such a case.

The cases cited by plaintiff are not in point. The case of *United States v. Pinto*, 44 F.R.D. 357 (W.D. Mich. 1968), where a delay of almost four years in filing a bill of costs was held to violate Rule 1, involved a simple consent judgment from which no appeals followed. In *Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888, 891 (10th Cir.1964), a local rule required the filing of a bill of costs within 10 days after the entry of judgment. In contrast, this case is not governed by any local rule and involved an appeal to the Fifth Circuit and

a possible petition for certiorari to the United States Supreme Court. The facts in this case are closer, although even more favorable to defendants here, to those in *United States v. Hoffa*, 497 F.2d 294 (7th Cir.1974). In *Hoffa*, costs of prosecution [4] were taxed to defendants where a bill of costs had been filed within one year of the entry of final judgment in the case. The Seventh Circuit noted that the circumstances of the particular case must be considered in determining whether the delay is reasonable and that:

> [w]hile eight years is obviously a long time, nevertheless—in view of the complicated nature of the case, the series of appeals encompassing seven years, the fact that the bill was filed within one year after the final culmination of the case, the obvious situation that the costs were not going to be paid until every appellate avenue had been exhausted, and the absence of a local rule—we are unable to say the delay violates Rule 1. Therefore, the district court did not abuse its discretion in taxing costs to appellants.

Id. at 296.

The bill of costs in this case was presented within six months after the Fifth Circuit's decision in this case and within four months after the passing of the deadline for the filing of a petition for certiorari. Such a delay cannot, in the absence of exceptional circumstances, be considered unreasonable.

Plaintiff claims that it has been prejudiced by the defendants' delay in filing its bill of costs. However, the plaintiff has not described the manner in which it has been prejudiced, and this Court is unable to discern any basis for this claim.[5] Under the circumstances, this Court

[4] The rules for the imposition of costs in criminal cases are the same as in civil cases. *Id.* at 296.

[5] Plaintiff intimates that it would be prejudiced by the unavailability of the trial judge to decide its motion. This concern has proved unfounded.

finds no unreasonable delay on the part of the defendants in filing their bill of costs.

3. Specific items to which plaintiff objects.

a. *Charts and audio-visual aids*

Plaintiff objects to the award of costs for charts and audio-visual aids. These charts and audio-visual aids were the following:

Four charts were prepared by L.R. Langard concerning the sale of Craword's products in the North Sea area. These charts were essential to refute plaintiff's claim of lost sales in that market.[6] The charts were introduced into evidence, and, although they were shown to the jury in connection with expert testimony, they were not merely illustrative of such testimony, but had independent significance. *See* 6 *Moore's Federal Practice* ¶ 54. 77[6] at 1741.

Falls Advertising Co. ("Falls") was retained by defendants to provide essential audio-visual assistance, including preparation of charts depicting defendants' organization and distribution scheme. This distribution scheme, attacked by plaintiff as anti-competitive, was the focal point of the litigation. A clear understanding of this scheme was essential and the use of charts exemplifying it was necessary to the proper presentation of defendants' case. Falls also provided a projector and screen which were used by both defendants and plaintiffs during the testimony to enlarge and display simultaneously to the Court, the jury, and the witness, key documents in the case. Without this aid, the handling of exhibits would have been time consuming and possibly confused. Indeed, the Court had requested the use of such a device prior to trial as a means of shortening the trial time and facilitat-

[6] Each of the charts for which costs are sought were listed in the pretrial order entered pursuant to Fed. R. Civ. P. 16.

ing the presentation of voluminous documentary evidence. Both these purposes were fully served at trial.

Falls provided other necessary services. Prior to the litigation, Richard M. Keeney, president of plaintiff, undertook to make extensive tape recordings of conversations he initiated with various defendants concerning his alleged inability to obtain Crawford products.[7] Falls worked extensively with the tapes, filtering them to make them easily understandable and devising an access system. These tapes were introduced as evidence in the case. The evidentiary value of these tapes was significantly enhanced by Falls efforts.

This case involved a variety of alleged antitrust violations. The issues involved in these various allegations would have been very difficult for a jury to resolve, and these inherent difficulties were exacerbated by the complex corporate organization and distribution structure of defendant Crawford and its numerous independent distributors. To prevent plaintiff from exploiting the high probability of jury confusion in this case, it was necessary for defendants to prepare and use at trial the charts and audio-visual aids described above. This case would not have been fairly and efficiently tried before the jury without the benefit of the charts and audio-visual aids for which costs are sought here.

In some courts, the costs challenged by plaintiff are allowable under 28 U.S.C. § 1920(4).[8] *See* 6 *Moore's Federal Practice* ¶ 54.77[6] at 1739 and cases cited at n. 10. ("The reasonable expense of preparing maps, charts, graphs, photographs, motion pictures, photostats and kindred materials is taxable as costs under § 1920(4) when necessarily obtained for use in the case.") The

[7] *See J.T. Gibbons, Inc. v. Crawford Fitting Co., Inc.*, 565 F.Supp. at 177 n.6 (E.D. La. 1981) (regarding substance of taped conversations.)

[8] *See* note 15 *infra* for text of 28 U.S.C. § 1920.

Fifth Circuit, however, has taken a restrictive view of the materials covered under this provision, holding in *Johns Manville Corp. v. Cement Asbestos Products Co.*, 428 F.2d 1381, 1385 (5th Cir. 1970), that "[t]here is no statutory provision for the taxation of charts and exhibits as costs." Given this view of the law, it appears that none of the costs requested by defendants under 28 U.S.C. § 1920(4) can be awarded pursuant to that statute. A trial court has equitable discretion, however, to award costs not specifically provided for by statute. *Farmer v. Arabian American Oil Co.*, 379 U.S. 227, 235 (1964); *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3rd Cir. 1981). The Fifth Circuit impliedly acknowledged this principle in *Johns Manville*, but disallowed an award of costs for charts and exhibits because no prior court approval had been obtained for the production of such materials. *Johns Manville*, 428 F.2d at 1385. *Accord Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 133 (5th Cir. 1983) (en banc); *United States v. Bexar County*, 89 F.R.D. 391 (W.D. Tex. 1981); *Hiller v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 60 F.R.D. 87, 90 (N.D. Ga. 1973).

Given the necessity at trial for the charts and audio-visual aids for which costs are sought here and the complexity of the case involved, this Court would, were it writing on a clean slate, grant defendants these costs. In view of the absence of prior court approval, however, the Court is constrained by the law of the Fifth Circuit, as set forth in the *Johns Manville* case, to deny costs for all of these items except one—the costs for the operation by Falls of the screen and projector and for the preparation of slides for use in connection therewith. Although no mention was made of costs at the time, the Court considers that its own request prior to trial is tantamount to prior court approval of these expenditures. This equip-

ment undoubtedly shortened the trial and facilitated the use of documentary evidence. Under the circumstances, the Court would regard it as inequitable to disallow these costs.

In sum, all costs for charts and audio-visual aids are reluctantly denied with the exception of those costs associated with the operation by Falls of the screen and projector and the preparation of slides for use at trial.[9]

b. *Transcripts*

Plaintiff objects to the taxing of costs for transcripts of depositions and daily trial transcripts.

Charges of the court reported for transcripts reasonably necessary for use in the case are recoverable as costs under 28 U.S.C. § 1920.[10] Plaintiff acknowledges that defendants may be entitled to costs for transcripts of depositions noticed by defendants. Plaintiff contends, however, that defendants are not entitled to costs for copies of depositions noticed by *plaintiff*. Plaintiff cites two cases in support of this proposition. The first case, *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir. 1978), does not appear to support plaintiff's argument. The *Kane* court did disallow costs for depositions noticed by the losing party. However, the disallowance rested on the ground that the losing party had paid for these depositions, and thence "represented no expense to" the prevailing party. *Id.* at 1059. Defendants herein do not seek costs *plaintiff* incurred in taking the depositions, but rather merely their *own* costs in obtaining for their own use *copies* of depositions notice by plaintiff. The logic of the *Kane* case is therefore inapplicable here.

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[9] The Court has reviewed the supplemental affidavit of Mr. David Shea, and finds that the amount of $18,494.28 was reasonably expended by defendants in connection with the operation of the projector and screen and the preparation of slides for use at trial.

[10] *See* note 15 *infra* for text of 28 U.S.C. § 1920.

The other cases cited by plaintiff, *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. 158 (S.D.N.Y. 1969), along with several other district court decisions cited by Professor Moore in his federal practice treatise, *see* 6 *Moore's Federal Practice* ¶ 54.77[4] at 1724 n.21, does appear to support plaintiff's contention. Other, more persuasive authority does not, however, support plaintiff's position. In *SCA Services, Inc. v. Lucky Stores*, 599 F.2d 178, 181 (7th Cir. 1979), the Seventh Circuit held that "[T]he expense of deposition copies reasonably necessary for use in the case may be included in the award of costs" and that this rule "applies to copies of both an *opponent's* and the prevailing party's own depositions." *Accord Murphy v. Amoco Production Co.*, 588 F.Supp. 591, 594 (D.N.D. 1983), *aff'd on other grounds*, No. 83-1533, slip op. (8th Cir. March 6, 1984); *Principe v. McDonald's Corp.*, 95 F.R.D. 34, 37 (E.D. Va. 1982). The Seventh Circuit relied heavily on the reasoning of a Fifth Circuit case, *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963), which, although not specifically addressing the issue whether costs are taxable for copies of an opponent's as well as a prevailing party's deposition, directly supports the rule adopted in *SCA Services, Inc.* *See United States v. Kolesar*, 313 F.2d 838-40. *See also Copper Liquor, Inc. v. Adolph Coors Company*, 684 F.2d 1087, 1099 (5th Cir. 1982) (reaffirming *Kolesar) reconsidered en banc*, 701 F.2d 542 (5th Cir. 1983) (relevant holding undisturbed). The Seventh Circuit noted:

> Attorney's offices are often distant from the courthouse where the original transcript of the deposition is filed; but, even if they are not, the practicalities of preparing a case for trial often require that the attorneys have frequent and ready access to the depositions, and that they be able to mark annotations and cross-references on the pages.

SCA Services, Inc. v. Lucky Stores, 599 F.2d at 181. This reasoning is essentially the same as that of the Fifth Circuit in *Kolesar*, and, as the Seventh Circuit recognized, is equally applicable to depositions noticed by losing parties as to those noticed by prevailing parties. This Court declines, therefore, to deny defendants costs for copies of certain depositions solely on the ground that such depositions were noticed by plaintiff rather than by defendants.

Plaintiff further contends that transcripts of depositions obtained merely for defendants' convenience are not taxable as costs and that "[d]efendants' memo is significantly lacking in specifics regarding the necessity of deposition transcripts [they] obtained for use in this case."

Costs may be taxed under 28 U.S.C. § 1920 (2) for deposition transcripts "necessarily obtained for use in the case." 28 U.S.C. § 1920 (2). A deposition need not be used at trial to be taxable. *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. at 162. Rather, such depositions are taxable as long as "the taking of the deposition is shown to have been reasonably necessary in the light of facts known to counsel at the time it was taken." *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1099 (5th Cir. 1982). Depositions which are merely investigative in nature are not taxable. 6 *Moore's Federal Practice* ¶ 54.77[4] at 1723; *Electronic Specialty Co. v. International Controls Corp.*, 47 F.R.D. at 167. However, the trial court has broad discretion to allow such costs and the burden is on the losing party to show the impropriety of taxing a particular deposition as a cost. *See Principe v. McDonald's Corp.*, 95 F.R.D. at 36; *Meder v. Everest & Jennings, Inc.*, 553 F.Supp. 149, 150 (E.D. Mo. 1982); *Ingersoll Milling Machine Co. v. Otis Elevator Co.*, 89 F.R.D. 433, 435 (N.D. Ill. 1981). "Unless the opposing party interposes a specific objection that a deposition was improperly taken or unduly pro-

longed, deposition costs will be taxed as having been 'necessarily obtained for use in the case' within the meaning of 28 U.S.C. § 1920." *Meder v. Everest & Jennings, Inc.*, 553 F.Supp. at 150. *Accord George R. Hall, Inc. v. Superior Trucking Co.*, 532 F.Supp. 985, 994 (N.D. Ga. 1982); *Federal Savings & Loan Insurance Corp. v. Szarabajka*, 330 F.Supp. 1202, 1210 (N.D. Ill. 1971). Plaintiff, in contending that defendants have failed to properly justify the taxation of depositions in this case, fails to recognize that it is *its* burden to demonstrate that the depositions should *not* be taxed. Plaintiff has not advanced any reason why any of the depositions at issue here should not be taxed and has thus totally failed to meet this burden.

Moreover, defendants have adequately demonstrated in their initial and supplemental memoranda and affidavits in opposition to plaintiff's motion [10a] that all the depositions at issue here were necessary for use in the antitrust case. Depositions which are introduced into evidence at trial or used during cross-examination are "necessary for use in the case." The depositions of the following witnesses were introduced in whole or in part into evidence and/or used for purposes of cross-examination at the trial of the antitrust case: Simon Thornhill, Bernard Pemberton, Richard Keeney, Irving B. Ozanne, and Wilbur Daigle.

Other depositions, although not introduced into evidence or used during cross-examination, were necessary for use in the antitrust case in light of the facts known at the time they were taken. The depositions of the following persons fall into this category: Michael Kenney, Ken Rolfs, Morris Forsythe, James Sullivan, Clifton Ryan, Robert Douran, Henry Dauterive, David Schaub, Ralph Fishman, and Cecil Kenney.

[10a] All the affidavits and the supplemental memorandum requested by the Court from defendants have been served upon plaintiff. Plaintiff has informed the Court that it does not wish to respond to any of these papers.

Michael Keeney was part owner and vice president of plaintiff and thus was intimately acquainted with its operations, including whether or not plaintiff had a source of supply for values and fittings.

Ken Rolfs and Morris Forsythe were employees of plaintiff responsible for taking orders from customers and placing orders with suppliers. Each had knowledge of plaintiff's purchases and sale of valves and fittings from defendants and from other manufacturers of valves and fittings. This knowledge was relevant to the boycott issue of whether plaintiff had a source of supply of valves and fittings and also to the definition of the market as being broader than Crawford's products. Moreover, Mr. Forsythe had knowledge of the shipping practices of plaintiff, a key issue in this suit.

James Sullivan and Clifton Ryan were both employees of plaintiff involved in export sales. As recounted in plaintiff's witness list, each had knowledge of the operation of plaintiff's business, plaintiff's relations with customers and suppliers and the purchase and sale by plaintiff of products lines.

Robert Douran and Henry Dauterive were both potential trial witnesses who did accounting work for plaintiff. As stated in the pretrial order, each had knowledge of the costs and profitability of plaintiff, including its values and fitting business, and the damages claimed by plaintiff as a result of the alleged unlawful conduct of defendants.

Cecil Keeney, the father of plaintiff's owners, David Schaub, one of the attorneys initially retained by plaintiff in connection with this case and Ralph Fishman, another of the attorneys first retained by plaintiff, were involved in negotiations with defendant Crawford regarding an alternate source of supply of Crawford products during the time plaintiff claimed it was being subjected to an antitrust boycott. Their depositions were taken in order

to help defendants prepare to defend plaintiff's boycott claim.[11]

Each of the above persons was a potential trial witness at the time of trial, as confirmed by their having been listed as "will call" or "may call" witnesses in the pretrial order.

The Court finds that the depositions of the above persons were necessarily obtained for use in the case. Furthermore, given the complexity and size of the case, the Court finds that *copies* of all deposition transcripts were also necessarily obtained. *See Studiengesellschaft Kohle v. Eastman Kodak*, 713 F.2d 128, 134 (5th Cir. 1983); *Capra, Inc. v. Ward Foods, Inc.*, 567 F.2d 1316, 1323 (5th Cir.1978), *overruled on other grounds, Copper Liquor, Inc. v. Adolph Coors Co.*, 701 F.2d 542 (5th Cir. 1983) (en banc).[12]

In sum, all deposition costs requested by defendants are allowed.

Plaintiff also challenges the award of costs for daily trial transcripts. Given the complexity of the case, the amount claimed, and the length of the trial, daily transcripts must be regarded as having been necessarily obtained for use in the case, and costs for such daily transcripts must be allowed. Plaintiff argues, however, that defendants are not entitled to only "their share" of such costs, without anywhere explaining what the term "their share" means.

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[11] David Schaub and Ralph Fishman were called in plaintiff's case in chief.

[12] Although the Court finds, given the complexity of the case, that all counsel had need for copies of the deposition transcripts at issue here, the Court notes that it would be particularly unjust to have expected defendants' trial counsel, who resided in Cleveland, Ohio, to have traveled to the courthouse in New Orleans whenever he needed to use a deposition transcript.

Defendants have supplied an affidavit and supporting documentation to the effect that they paid $26,607.00 for daily trial transcripts. The sum is reasonable and this is the amount to which defendants are entitled.

B. *Defendants' Motion for Review of Costs* [13]

1. Expert witness fees

Rule 54(d) of the Federal Rules of Civil Procedure provides that, in the absence of other statutory authority, "costs shall be allowed as of course to the prevailing party, unless the court otherwise directs." The issue here is whether defendants are entitled to the amount requested as costs for expert witness fees.

It is clear that not all expenses incurred by a party in connection with a lawsuit constitute recoverable costs. Generally, courts award only those costs specifically enumerated by statute, rule of court, or in the custom, practice or usage of a particular district.[14] *See* 6 *Moore's Federal Practice* ¶ 54.77[1] at 1701 (2d ed. 1983).

The basic statutory enumeration of allowable costs is 28 U.S.C. § 1920.[15] Among the expenses taxable as costs

[13] It should be noted that plaintiff specifically objects to the awarding of costs for expert witness fees or expenses of the Scotland deposition.

[14] The Court understands that it is the general policy of the Clerk of the Court for the Eastern District of Louisiana not to tax expert witness fees as costs.

[15] Section 1920 provides:

A judge or clerk of any court of the United States may tax as cost the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

under this statute are "fees and disbursements for . . . witnesses." The general rule, however, is that expert witness fees are not taxable as costs beyond the statutory per diem fee, mileage, and subsistence allowance provided for under 28 U.S.C. § 1821.[16] *Henkel v. Chicago, St. Paul,*

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920.

[16] Section 1821 provides in relevant part:

(a)(1) Except as otherwise provided by law, a witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid for the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the begining and end of such attendance or at any time during such attendance.

(c)(1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier at the most economical rate reasonably available. A receipt or other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Tool charges for toll roads, bridges, tunnels and ferries, taxicab fares between places of lodging and carrier terminals, and park-

Minnesota & Omaha Railway Co., 284 U.S. 444, 446 (1932); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981); *Burgess v. Williamson*, 506 F.2d 870, 879 (5th Cir. 1975); *Baum v. United States*, 432 F.2d 85, 86 (5th Cir. 1970); *United States v. Kolesar*, 313 F.2d 835, 837 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70, 77 (5th Cir. 1962); 6 *Moore's Federal Practice* ¶ 54.77[5.-3] at 1734 (2d ed. 1983); 10 Wright & Miller, *Federal Practice and Procedure, Civil* § 2678

Several exceptions to this general rule have developed, however. Fees for court-appointed experts may be taxed as costs beyond the statutory subsistence and travel allowance. 28 U.S.C. § 1920(6); *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534, 540 (N.D. Miss. 1978). Expert witness fees may be taxed as costs in some cases where "the court is satisfied that the situation is exceptional *and the court makes an order* to that effect *prior to the expert being called.*" 6 *Moore's Federal Practice* ¶ 54.77[5.-3] at 1735 (2d ed. 1983) (citation omitted) (emphasis added). In diversity cases, expert witness fees may be taxed as costs when state law so provides. *Henning v. Lake Charles Harbor & Terminal District*, 387

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ing fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside, the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d) (1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day. 28 U.S.C. § 1821.

(2) A subsistence allowance for a witness shall be paid in the amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702 (a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

28 U.S.C. § 1821.

F.2d 264, 267 (5th Cir. 1969). A recent trend has been to allow the taxation of expert witness fees beyond the statutory allowance in civil rights cases. *Barry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981). Authority for such taxation of expert witness fees has been found in congressional intent to encourage the initiation of civil rights actions.

None of the exceptions set forth above apply in the instant case,[17] and defendants do not attempt to invoke any of these theories. Rather, defendants rely on a rule recently adopted by the Third and Eighth Circuits which holds that district courts have equitable discretion to award expert witness fees exceeding the statutory allowance whenever the expert's testimony is indispensable to the determination of the case. *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201, 206 (3rd Cir. 1981); *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39, (8th Cir. 1982), *rev'd on other grounds*, Nos. 81-1963 and 82-1390, slip op. (Feb. 6, 1984) (en banc); *Welsh v. Likins*, 68 F.R.D. 589, 596-97 (D. Minn.), *aff'd* 525 F.2d 987 (8th Cir. 1975) (affirmed per curiam on basis of district court's opinion). *See also Shakey's Inc. v. Covalt*, 704 F.2d 426, 437 (9th Cir. 1983) (denying costs for expert witness fees, but implying that the "indispensability" rule is valid in the Ninth Circuit). This rule has been specifically rejected by the District of Columbia Circuit. *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066-1068 (D.C. Cir. 1981). *See also Illinois v. Sangamo Construc-*

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[17] Expert witness fees beyond the statutory limitation have also been awarded "when an unfounded action or defense is maintained in bad faith, vexatiously, wantonly, or for oppressive reasons." *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971). Despite the utter baselessness of plaintiff's antitrust claims in this case, as set forth in the Court's earlier opinions, the jury verdict on the counterclaim would appear to preclude reliance upon this theory for the awarding of expert witness fees in this case. *See* note 1 *supra*.

tion Co., 657 F.2d 855, 864-865 (7th Cir. 1981) (strict rule limiting expert witness fees to statutory allowance, but no specific discussion of indispensability rule).

In rejecting the indispensability rule, the District of Columbia Circuit relied on the Supreme Court's decision in *Henkel v. Chicago, St. Paul, Minnesota & Omaha Railway Co.*, 284 U.S. 444 (1932). The Court stated:

> Under [the predecessor statute to § 1821] additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed in cases in the federal courts. The Congress has dealt with the subject comprehensively and has made no exception of the fees of expert witnesses.

Id. at 446.[18]

Both the Third and Eighth Circuits have held, however, that a subsequent Supreme Court case, *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), qualified *Henkel* so as to allow district courts discretion to award experts' fees as costs when expert testimony is indispensable to the resolution of the case. *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d at 203-06; *Paschall v. Kansas City Star Co.*, 695 F.2d at 338-39. In *Farmer*, the Supreme Court upheld a district court's refusal to tax travel expenses and stenographer's fees as costs, under circumstances in which the district judge found that the prevailing party had deliberately run up a "huge bill of costs." The Supreme Court held:

> We think that under the circumstances [the district judge] could not be charged with any improper exercise of the discretion vested in him by Rule 54(d). We do not regard that Rule as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items

[18] It should be noted that the Supreme Court has never had occasion to construe the current versions of 28 U.S.C. §§ 1821 and 1920.

> proposed by winning parties as costs should always be given careful scrutiny. . . . Therefore the discretion give district judges to tax costs should be sparingly exercised *with reference to expenses not specifically allowed by statute.* Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation.

Farmer, 379 U.S. at 235 (emphasis added).

In *Paschall*, the Eighth Circuit held that this language in *Farmer* "authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821." *Paschall*, 695 F.2d at 338. The Eighth Circuit went on to hold that this language affords district courts discretion to award expenses for expert witness fees when expert testimony is "crucial" or "indispensable" to the determination of the case. *Id.* at 339.

The Third Circuit also found authority for the indispensability rule in the *Farmer* opinion. After quoting the language from *Farmer* relied on by the Eighth Circuit in *Paschall*, Judge Gibbons wrote:

> Farmer appears to hold that Rule 54(d) authorizes district judges to exercise discretion—albeit "sparing"—to award costs not specifically enumerated in § 1821. The Court seemed concerned to avoid taxation of unnecessary and possibly vexatious costs accumulated by a prevailing party. Hence the reference to a national policy in favor of restrained award of costs. It is important to note that the Court based its interpretation of Rule 54(d) not on a *Henkel*-like theory of statutory preclusion of costs not listed in § 1821, but on policy considerations militating against award of unenumerated costs. A district court should therefore carefully scrutinize the prevailing party's bill of costs in order to assure that any award will compensate only those expendi-

tures necessary to the litigation. While Farmer commands perhaps a tight-fisted exercise of discretion in order to insure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures.

We therefore agree with the District of Minnesota and the Eighth Circuit that Farmer affords a district court equitable discretion to award expert fees when the expert's testimony is indispensable to determination of the case.

Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d at 206 (Footnote omitted).[19]

Although the Fifth Circuit has long adhered to the basic rule that expert witness fees are generally not taxable as costs beyond the statutory allowance, this Circuit has never had occasion to pass specifically on the validity of the indispensability rule adopted by the Third and Eighth Circuits. Moreover, the only Fifth Circuit case specifically mentioning the indispensability rule appears to leave the door open to its application in this Circuit:

> Expert witnesses generally may be allowed only the fees allowed "fact" witnesses, as prescribed by 28 U.S.C. § 1821. Courts of appeal have approved trial court discretion to award the full fee charged by the expert in exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, *or indispensable to the determination of the case.* [citing *Roberts and Weis v. Likins.* If counsel plan

[19] Although the district court from which the appeal in *Roberts* was taken had a local rule granting the court discretion to award expert witness fees when the expert testimony was crucial to the resolution of the issues in the case, it is clear that the Third Circuit's holding with respect to district court's discretion to award expert witness fees was not dependent on this local rule.

> to seek allowance of the entire expert's fee, the better practice is to seek court approval before calling the expert witness. The court should consider these factors if counsel seek an allowance for experts in excess of the fee allowed for fact witnesses.

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1100 (5th Cir. 1982) (citations omitted) (emphasis added). *reconsidered en banc*, 701 F.2d 542 (5th Cir. 1981) (relevant language undisturbed).[20]

Furthermore, the *Copper Liquor* Court specifically embraced the view stated by Judge Gibbons in *Roberts* that the Supreme Court in *Farmer* acknowledged the equitable discretion of trial courts to award costs not specifically enumerated by statute. *Id.* at 1099. In this connection, the Fifth Circuit stated that expenditures other than those provided for by statute "may be taxed as costs in exceptional cases presenting unusual equitable considerations in order to achieve justice." *Id.*[21]

[20] Surprisingly, this case was not cited by defendants on this issue.

The Court has considered the fact that no prior approval was sought for the expenses at issue here. The Court notes, however, that the *Copper Liquor* Court did not establish lack of prior approval as an absolute bar to the awarding of expert witness fees as costs, as did the court in *John Mansville* with respect to charts and exhibits. Under the circumstances of this case, the Court does not feel that the lack of prior approval requires the denial of these costs.

[21] A district court in this Circuit has repeatedly indicated its approval of the rule that expert witness fees may be awarded as costs where the expert's testimony is indispensable to the presentation of the prevailing party's case, although it has sometimes declined to award such fees under the specific circumstances of a particular case. *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534, 541 (N.D. Miss. 1978), *citing with approval Yarbrough v. Town of Ackerman*, Civil Action No. EC 75-163-K (N.D. Miss. Feb. 25, 1977); *Brooks v. Town of Sunflower*, Civil Action No. GC 71-57-K (N.D. Miss. Mar. 27, 1975) (cited and distinguished in *Worley, supra*). *See also Pate v. General Motors Corp.*, 89 F.R.D. 342, 344

In view of the Fifth Circuit's statement in *Copper Liquor* and the absence of any specific disavawal of the indispensability rule by this Circuit, the Court considers itself free to adopt the persuasive reasoning of the Third Circuit in *Roberts* and the Eighth Circuit in *Paschall*. This Court believes that the Third Circuit in *Roberts* and the Eighth Circuit in *Paschall* properly construed *Farmer* as having modified the *Henkel* rule so as to grant district courts discretion to award as costs "legitimate and indispensable litigation expenses," including expert witness fees, beyond those specifically provided for by statute.[22] *Roberts*, 651 F.2d at 206. It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where defendants were forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims.[23]

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n. 2 (N.D. Miss. 1981) (stating that the general rule against the taxing of expert witness fees beyond the statutory allowance "is not inflexible," and that "[u]nder unusual, exceptional or extraordinary circumstances, in the interest of justice and fair play, expert witness fees may be allowable as part of costs"); *Wade v. Mississippi Cooperative Extension Service*, 64 F.R.D. 102, 105 (N.D. Miss. 1974) (citing and distinguishing *Brooks, supra*).

[22] Even the District of Columbia Circuit, in rejecting the indispensability rule, acknowledged that the awarding of expert witness fees beyond the statutory amount would be appropriate under "exceptional circumstances." *Quy v. Air America, Inc.*, 667 F.2d at 1066. Despite the jury verdict against defendants on the counterclaim, the utter baselessness of plaintiff's antitrust claims and the existence of considerable evidence in the record indicating that plaintiff was using this litigation to obtain a Louisiana distributorship, may well constitute "exceptional circumstances" so as to allow the awarding of costs for expert witness testimony under the standard adopted by the District of Columbia Circuit.

[23] Additionally, to became apparent during the trial that defendants had been subjected to abusive documentary discovery, costing they very considerable expense and inconvenience, and that plaintiff had made scant use of this discovery.

The question now becomes, then, whether the expert testimony fees for which defendants seek reimbursement were "crucial" or "indispensable" to the presentation of their case. Defendants seek an award of costs for the fees of three expert witnesses—Dr. Thomas R. Saving, Dr. Phillip R. Roberts, and Mr. James C. Boland.

Dr. Thomas R. Saving is an expert economist who testified to the competitive impact of the practices challenged by plaintiff. Dr. Saving analyzed the economic impact of defendant Crawfcrd's organizational scheme, the territorial restrictions imposed by Crawford on its distributors, the five percent commission-sharing program for extra-territorial sales, and the exchange rate adjustments made by Crawford during 1978—all matters challenged as "anticompetitive" by plaintiff. As the Eighth Circuit noted in *Paschall*, 695 F.2d at 339, issues of economic impact are crucial in antitrust cases, and Dr. Saving's testimony was indispensable to the determination of such issues in the case. Indeed, this Court relied heavily on Dr. Saving's market and currency analysis in deciding defendants' motions for directed verdicts.[24]

Dr. Phillip R. Robers, a partner with the independent public accounting firm of Ernst & Whinney, also supplied evidence crucial to the defense of plaintiff's group boycott claim. Dr. Robers' testimony established that not only was plaintiff undamaged by its inability to obtain products from deefndant Capital Value, but that it actually reecived better delivery times and rates from another supplier after its discontinuance by Capital. His testimony was clearly necessary to this Court's determination that plaintiff had failed to prove any injury. The lack of injury was central to the decision to grant directed ver-

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[24] *See J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 565 F.Supp. at 180, 183, 185 n. 15.

dicts in defendants' favor and was relied on by the Fifth Circuit in affirming that ruling.[25]

Mr. James C. Boland, also of the Ernst & Whinney firm, testified about plaintiff's claim of lost profits arising out of defendants' alleged refusal to deal. Mr. Boland testified that an extensive review of plaintiff's financial data revealed that plaintiff actually lost money on its exportation of valves and fittings. Mr. Boland's testimony would have been crucial on the issue of plaintiff's damages had plaintiff's claims been allowed to go to the jury. The quantum of damages became irrelevant, however, upon the disposition of the case by directed verdicts in defendants' favor. Moreover, this Court specifically declined to rely on Mr. Boland's testimony in reaching its decision to grant directed verdicts. *See* 565 F.Supp. at 181. Nor was his testimony relied upon by the Fifth Circuit in affirming this Court's decision. Under these circumstances, Mr. Boland's testimony cannot be regarded as indispensable, and costs for his testimony are therefore denied.

In sum, the expert testimony of Drs. Saving and Robers was crucial and indispensable to the presentation of defendants case. Mr. Boland's testimony cannot be so regarded. Additionally, and upon review of the documentation submitted in support of defendants' bill of costs, the Court determines that the amounts requested for Drs. Saving's and Rober's testimony are reasonable. The amounts so requested are hereby allowed.

2. Scotland deposition

Defendants ask this Court to exercise its equitable discretion to award them as costs the expenses and attorney's fees incurred in connection with a journey to Scot-

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[25] *See J.T. Gibbons v. Crawford Fitting Co.*, 704 F.2d at 793 n. 4, 565 F.Supp. at 180.

land to take certain depositions. The circumstances surrounding this journey are as follows.

Hydrasus (Aberdeen) Ltd. was the customer in Aberdeen, Scotland to whom plaintiff exports products it purchased from defendant Crawford's distributors. Early in the course of discovery, plaintiff represented that Hydrasun had knowledge of facts at issue, and particularly the alleged losses claimed by plaintiff as a result of the alleged boycott. Moreover, Hydrasun formally assigned to plaintiff any and all rights of action it might have had against defendants in exchange for plaintiff's agreement to retain counsel to pursue any such rights and to pay Hydrasun one-third of any recovery.

From almost the inception of this lawsuit, defendants attempted to procure the depositions of Stanley Frazer and William Cameron, two principals at Hydrasun. Because of the tremendous expenses and difficulties incident to obtaining discovery outside of the United States, defendant Crawford agreed to plaintiff's request to make Crawford's Scottish distributor available in this country at its own expense, in exchange for plaintiff's commitment to use its "best efforts" to make Messrs. Cameron and Frazer similarly available. The Crawford distributor from Scotland, Dave Cheetham, was deposed by plaintiff in the United States pursuant to this agreement early in the litigation.

Attempts by defendants to depose Frazer and Cameron, however, met with no success, despite repeated requests by defense counsel. In early June of 1980, plaintiff stated that it was bringing these witnesses in for the trial and that defendants could depose them at that time, a proposal clearly unacceptable to defendants. On June 6, 1980, a court order was entered directing that Stanley Frazer and William Cameron be made available for deposition in the United States, upon agreement by defendants to pay their expenses.

These depositions did in fact commence in early July of 1980. It became apparent at that time that Mr. Cameron had been in New Orleans conferring with plaintiff in early May of 1980. Mr. Cameron confirmed in his own deposition in July of 1980 (taken pursuant to court order) that he had been in New Orleans in May of that year, and that he had expected his deposition to be taken, and did not know why it had not gone forward at that time. Plaintiff had made neither defendants nor the court aware of this visit, merely insisting throughout the course of the discovery that it would do its best to make these witnesses available.

Frazer and Cameron insisted on leaving their depositions early for personal reasons. A conference before the magistrate was held, after which it was ordered that defendants be accorded a full and fair opportunity to depose these witnesses and examine documents in Scotland. A subpoena duces tecum was then served on the witnesses and another conference held to resolve objections thereto. These objections were disposed of, and the witnesses ordered to respond to proper requests at the designated time and place in Scotland.

On July 20, defendants sent three attorneys, Messrs. Mansour, Balhoff, and Cellini to take the ordered depositions. Accompanying counsel were the executive vice-president of defendant Crawford, the president of defendant Capital Valve and a court reporter. No one appeared on behalf of plaintiff. Hydrasun was represented by New Orleans counsel and by Scottish counsel.

At this time, Frazer and Cameron expressed a reluctance to divulge the financial documents requested. Defense counsel explained that these documents were necessary because of plaintiff's allegations of damage and because of plaintiff's recent motion to join additional defendants filed on June 19, 1980. These additional defendants included authorized Crawford distributors in Scotland and Norway who would, if joined, be required to furnish

financial data. Hydrasun declined to produce business information it regarded as confidential (fearing that it would be revealed to its competitors), unless plaintiff agreed to withdraw its motion to join defendants. By telephone that same date, plaintiff's counsel declined to do so. Accordingly, the deposition concluded, with no testimony taken and no documents produced. On September 19, 1980, plaintiff voluntarily withdrew its motion to join defendants.

Defendants went to great expense to obtain orders compelling discovery from Frazer and Cameron, to fly them to the United States for essentially aborted depositions, and to fly defense counsel to Scotland to resume the depositions pursuant to court order. All of this expense ultimately counted for nothing, as the witnesses finally refused to involve themselves in any way with the matter. This expense was attributtable to plaintiff's manifold evasions and vexatious changes of position.

The law is clear that attorneys' fees and travel expenses incurred in connection with the taking of a deposition usually are not taxable costs. *United States v. Bexar County*, 89 F.R.D. 391, 394 n.5 (W.D. Tex. 1981); *Hope Basket Co. v. Product Advancement Corp.*, 104 F.Supp. 444, 451 (W.D. Mich. 1952); 4 *Moore's Federal Practice* ¶ 26.82 (2d ed. 1983); 6 *Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1983). However, under circumstances evidencing bad faith, vexatiousness or oppressiveness, an award of such costs may be made under the court's general equitable power. *See United States v. Bexar County*, 89 F.R.D. at 394 n.5 (travel, lodging and subsistence expenses incident to taking of depositions not taxable, in absence of prior court approval, *without a showing of extraordinary circumstances*); *Hope Basket Co. v. Product Advancement Corp.*, 104 F.Supp. at 451 ("no finding of unfairness or bad faith on the part of the plaintiffs or any finding of other equitable considerations which would justify an award of these attorney's fees and expenses as

taxable costs."); 4 *Moore's Federal Practice* ¶ 26.82 (2d ed 1983); 6 *Moore's Federal Practice* ¶ 54.77[2] (2d ed. 1983). Such equitable considerations clearly exist in this case. Plaintiff's conduct in this matter provides evidence of palapable vexatiousness. Under these circumstances, it would be unfair to force defendants to bear the costs of taking the court-ordered depositions in Scotland.

The court has reviewed the affidavits submitted in support of defendants' request for expenses incurred in connection with the Scotland deposition. The Court deems the amount requested for attorneys' fees and travel expenses actually paid by defendants to be reasonable under the circumstances. The Court notes that those who traveled to Scotland on defendants' behalf used a private airplane owned by Crawford to fly from Cleveland, Ohio to Aberdeen, Scotland and back. The affidavits submitted in support of the request for costs incurred in connection with the Scotland deposition trip do not state the amount expended for the use of this airplane. This being the case, the Court adopts the rate suggested by defendants, namely the rate of 24 cents per mile, the maximum statutory amount allowed government employees traveling on government business by private airplane. 5 U.S.C. § 5704. At this rate, a total of $1,758.48 (24 cents x 7,327 miles) is allowed for the transportation of all six persons traveling to Scotland on defendants' behalf. This amount is surely far less than the commercial airfare would have been and must be deemed reasonable under the circumstances.

In sum, $11,390.40 is allowed for attorneys' fees and general travel expenses incurred in connection with the Scotland depositions and $1,758.48 is allowed for the use of a private airplane to travel to Scotland and back.

III CONCLUSION

This court has pondered the argument that plaintiff acted as a private law enforcer and that it and others

like it should not be deterred in pursuing violators of the antitrust laws by the assessment of substantial costs against it. There are several answers to this. The first is that there must be some limits and some discipline applied even to law enforcement in this sense. The defendants were subjected to massive discovery and gigantic litigation costs by this action. The costs allowed by this decision are small by comparison. As this court had occasion to point out at an earlier stage of litigation, *J.T. Gibbons, Inc. v. Crawford Fitting Company*, 565 F.Supp. at 192:

> This case involved multimillion dollar claims of corporations against one another for alleged damages occasioned by their business activities. None of the individuals involved were poor. On the contrary, the evidence indicated they were all highly successful, intelligent businessmen.

It would be inequitable to relieve plaintiff of the obligation to pay the minimal costs assessed in this case.

The second answer is that the plaintiff in this case was clearly interested in advancing its own financial interest. Far from vindicating the public interest, there was considerable evidence in the record indicating that the Keeney's were using this litigation to obtain a Louisiana distributorship from Crawford Fitting Company.

The third answer is that the public interest is not served when a complex antitrust case containing all the abstruse verbiage known only to antitrust practitioners, and having no merit whatever, is thrust upon our overcrowded court dockets. This is a blatant disservice to the court system and to those litigants whose cases demand attention.[28]

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[28] Commenting on the role of trial judges in deterring the abuse of the court system, Chief Justice Burger said the following in his annual message on the administration of justice:

> Judges in some State courts and in Federal courts have exercised their discretionary authority to impose sanctions both on

The following is a summary of the costs allowed and disallowed in this case. The costs taxed for service of subpoenas ($89.55), witness fees ($1,610.00), depositions ($9,747.65) and daily trial transcripts ($21,607.00) stand as taxed by the clerk. The costs taxed under the category "exemplification and copies" are denied with the exception of $18,494.28 paid to Falls Advertising Company for the operation of the projector and screen at trial the preparation of slides used in connection therewith. Costs for expert witness fees paid to Dr. Thomas R. Saving ($37,255.70) are allowed, as are those paid to Dr. Phillip Robers ($49,225.00). Costs for expert witness fees paid to Mr. James C. Boland ($64,000.00) are disallowed. Costs for expenses incurred in connection with the deposition trip to Scotland are allowed in the amount of $13,148.88.

An outline of the costs allowed and disallowed is as follows:

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attorneys and their clients for filing frivolous cases and for abuse of discovery processes. In one state case, a trial judge held that the plaintiff's case was based on totally frivolous allegations and ordered the payment of nearly two million dollars in fees and expenses. Another judge imposed heavy costs against both the plaintiff and the attorney based on the State's new Civil Code of Procedures that authorized trial judges to impose sanctions on parties and attorneys who litigate in bad faith.

Annual Message on the Administration of Justice from Chief Justice Warren E. Burger, Midyear Meeting, American Bar Association (Feb. 12, 1984).

ALLOWED

Services of subpoenas	$ 89.55
Statutory witness fees	1,610.00
Daily trial transcripts	21,607.00
Costs incident to taking of depositions and copies of deposition transcripts	9,747.65
Operation of projector, screen and preparation of slides	18,494.28
Expert witness fees	8,480.70
Scotland Deposition	13,148.88
	$151,178.06

DISALLOWED

Audio-visual aids	$ 6,191.37
Expert witness fees	64,000.00
	$70,191.37

In conclusion, defendants are hereby awarded $151,178.06 in costs.

SO ORDERED.

EDMUND L. PALMIERI
U.S.D.J.

New York, New York
April 2, 1984

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-4616

INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO
and its LOCAL NO. 5-376,
Plaintiff-Appellee,
v.

CHAMPION INTERNATIONAL CORPORATION,
Defendant-Appellant.

Filed June 2, 1986

Before: Clark, Chief Judge, Wisdom, Gee, Rubin, Reavley, Randall, Johnson, Williams, Garwood, Jolly, Higginbotham, Davis, Hill and Jones, Circuit Judges.*

Opinion by Judge Carolyn Dineen Randall;
Concurrence and Dissent by Judge Alvin B. Rubin

Appeal from the United States District Court
for the Northern District of Mississippi
Norman L. Gillespie, Magistrate, Presiding

OPINION

CAROLYN DINEEN RANDALL, Circuit Judge:

Section 1920 of Title 28 allows the fees of witnesses to be taxed as costs in federal court, while section 1821

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* Due to his death on March 27, 1986, Judge Albert Tate, Jr. did not participate in this decision.

of the same title establishes the amount that may be so taxed. The case before us today asks whether—and if so, when—federal courts in non-diversity cases may tax as costs the fees of non-court-appointed expert witnesses in excess of the amount set forth in 28 U.S.C. § 1821. We hold that the fees of non-court-appointed expert witnesses are taxable only in the amount specified by § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of three narrow equitable exceptions to the American Rule applies. Our holding overrules those portions of *Jones v. Diamond*, 636 F.2d 1364 (5th Cir.) (en banc), *cert. dismissed*, 453 U.S. 950 (1981); *Copper Liquor Inc. v. Adolph Coors Co.*, 684 F.2d 1087 (5th Cir. 1982) (*Copper Liquor III*), *modified on other grounds en banc*, 701 F.2d 542 (5th Cir. 1983), and their progeny approving the taxing of excess expert witness' fees as costs under standards different from that here announced.

I.

International Woodworkers of America, AFL-CIO, CLC ("IWA") and one of its local unions sued Champion International Corporation ("Champion") alleging racial discrimination in employment in violation of Title VII and 42 U.S.C. § 1981. After a trial, the district court entered judgment on the merits dismissing the claims of all plaintiffs and assessing costs against IWA. We affirmed the district court's judgment on the merits.

After denying Champion's motion for attorneys' fees, the district judge referred all other questions to a magistrate. The magistrate awarded Champion $14,750.87 in costs, of which $11,807.16 were for a portion of the services of an expert witness employed by Champion for the statistical aspects of the case. IWA objected to certain parts of the award, particularly to the taxing of the expert witness' fees in an amount exceeding that provided for by § 1821, and the case returned to the district judge.

The district judge sustained IWA's objections to the taxing of the excess expert witness' fees, concluding that this court in *Jones v. Diamond* had adopted for the purpose of defendants' excess expert witness' fees the *Christianburg* standard set forth by the Supreme Court governing attorneys' fees.[1] Because IWA's suit did not meet this standard, the district court refused to grant Champion expert witness' fees in excess of the amount provided by § 1821.

On appeal, a panel of this court affirmed, rejecting Champion's argument that *Copper Liquor III* authorized excess expert witness' fees to a prevailing defendant if the "expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case." The district court's finding that the IWA-Champion litigation failed to meet the *Christiansburg* standard remained unchallenged on appeal; the panel thus declined to reach the applicability of that standard. This court voted to rehear the case en banc, thereby vacating the panel opinion. *See* Fifth Circuit Local Rule 41.3.

II.

In the United States, contrary to the English practice, a rule of limited recovery of the expenses of litigation has developed to discourage costly litigation and guarantee access to the courts. *See, e.g., Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967). The "American Rule" draws a distinction between expenditures incurred by order of the court to facilitate consideration of the case, and expenditures incurred merely to aid one party in the presentation of his side. *See Ex Parte Peterson*, 253 U.S. 300, 316 (1920). The

[1] In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the Supreme Court held that prevailing civil rights defendants are entitled to attorneys' fees only when the lawsuit is frivolous, unreasonable, or without foundation.

former, in times past referred to as costs "between party and party," and now known as taxable costs, are recoverable by the prevailing party under the American Rule; the latter, denominated costs "as between solicitor and client" and including such items as attorneys' fees and "other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute," *see Sprague v. Ticonic National Bank*, 307 U.S. 161, 164 (1939), such as expert witness' fees in excess of the amount provided for by statute, are generally borne by the litigants.

Before the merger of law and equity, courts at law awarded to the prevailing party costs "between party and party" as a matter of course. Courts sitting in equity had discretion to award such costs, or a portion thereof, as justice might demand. Federal courts sitting in equity also had limited discretion to award costs "as between solicitor and client" in certain exceptional cases. These exceptions to the American Rule were nearly identical to those recognized by the English High Court of Chancery: the "foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation." *Sprague*, 307 U.S. at 166. The exceptions were limited to cases involving preservation of a common fund, vexatious or oppressive prosecution of a claim or maintenance of a defense, *Hall v. Cole*, 412 U.S. 1, 5-6 (1972), or wilful disobedience of a court order. *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 426-28 (1923). Absent statute or equitable exception, however, under the American Rule litigants paid their own costs "as between solicitor and client."

In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247 (1975), the Supreme Court decided against fashioning a far-reaching exception to the American Rule for attorneys' fees, determining instead that it

would be "inappropriate for the judiciary, without legislative guidance, to reallocate the burdens of litigation. . . ." The Court reasoned that 28 U.S.C. § 1920(5) and § 1923 controlled the amount that might be awarded as attorneys' fees. The Court examined the congressional intent behind the statutory predecessor of § 1920 and § 1923: the Fee Bill of 1853. In enacting the 1853 Act, Congress undertook to standardize and limit the costs allowable in federal litigation. *Alyeska*, 421 U.S. at 251-252. The 1853 Act did not permit courts to "tax against the losing party 'solicitor and client' costs in excess of the amounts prescribed" therein. *Id.* at 258 n.30. True to the American Rule, the Court concluded that "absent statute or enforceable contract, litigants pay their own attorneys' fees." *Id.* at 257. Despite its decision not to carve a broad exception to the American Rule, the Court nevertheless recognized the three judicially fashioned equitable exceptions which, as the Court noted, have not been repudiated by Congress. *Id.* at 260. A federal court might award reasonable attorneys' fees to the prevailing party in excess of the small sums permitted by § 1923 when: (1) the trustee of a fund or property, or a party in interest, preserved or recovered the fund for the benefit of others in addition to himself; (2) a party acted in wilful disobedience of a court order; or (3) the losing party had acted in bad faith, vexatiously, wantonly, or for oppressive reasons.[2]

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[2] The last exception is consistent with our decison in *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631 (5th Cir.), *cert. denied*, 404 U.S. 941 (1971), in which we held that attorneys' fees and evcess expert witness' fees were taxable against a party acting in bad faith.

The Supreme Court has recently reaffirmed the limited nature of the exceptions to the American Rule, noting that most of the exceptions to the rule are statutory. *Marek v. Chesney*, 105 S. Ct. 3012, 3016 (1985). *See also Webb v. Board of Education of Dyer County*, 105 S. Ct. 1923, 1930 n.1 (1985) (Brennan, J., dissenting) (referring to the exceptions as "several narrow exceptions").

The American Rule of limited recovery, although most often discussed in the context of attorneys' fees, is equally applicable in the context of excess expert witness' fees. Like the statutory provisions before the *Alyeska* Court, those before us today find their origins in the Fee Bill of 1853. Section 1920 states that the court may tax as "costs" the fees of witnesses.[3] Section 1821 establishes the maximum amount that may be allowed for witnesses' attendance fees.[4] These sections represent Congress' treatment of the taxing of witness fees as costs. Courts cannot, in the absence of other explicit statutory author-

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[3] Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshal;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case.
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
>
> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[4] Section 1821 provides in relevant part:

> (b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

This section draws no distinction between ordinary and expert witnesses, and it—or, more precisely, its statutory predecessor—has been held to apply to both categories of witnesses alike. *See Henkel v. Chicago, St. P., M. and O. Ruy.*, 284 U.S. 444 (1932).

ity or one of the three limited equitable exceptions recognized in *Alyeska*, tax as costs expert witness' fees in excess of the amount set forth in § 1821. Moreover, because the taxing of witness' fees as costs has been expressly provided for by federal statute, federal courts cannot tax excess fees as costs under Fed. R. Civ. P. 54(d), which provides for court discretion to tax costs "[e]*xcept* where express provisions therefor is made either in a statute of the United States or in these rules" (emphasis added).[5]

Our ruling is commanded by the Supreme Court's holding in *Henkel v. Chicago, St. P., M. and O. Rwy.*, 284 U.S. 444 (1932). Citing a statutory predecessor to § 1920 and § 1821, the Court found that because federal law made express provision for the amount payable and taxable as witness' fees, "additional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the federal courts." *Id.* at 446. The Court further observed that "Congress has dealt with the subject [of witness' fees] comprehensively and has made no exception of the fees of expert witnesses." *Id.* at 447. Although *Henkel* was a case decided "at law," the subsequent merger of law and equity effected by the adoption of the Federal Rules of Civil Procedure does not alter the result in *Henkel* in view of the

[5] Federal Rule of Civil Procedure 54(d) provides in pertinent part: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." The Rule embodies the notion applicable to all civil actions after the merger of law and equity that, except as otherwise expressly provided by statute or rule, costs should be allowed as of course to the prevailing party. A federal court in its discretion could direct that certain costs, otherwise allowed as a matter of course, not be allowed.

That Rule 54(d) cannot be used to circumvent the limits on costs set forth in § 1920 and § 1821 was recognized by the drafters of the Rule. The Advisory Committee's Notes to Rule 54(d) emphasized that the terms of the statutory predecessor of § 1920 remained "unaffected by the rule."

specific language in Fed. R. Civ. P. 54(d) dealing with costs which are covered by express federal statutes.

The Court's reasoning in *Alyeska* in the analogous area of attorneys' fees further compels our conclusion that expert witness' fees are generally not recoverable beyond the amount specified by statute. As noted above, like the provisions before the *Alyeska* court, those before us today are statutory heirs of the Fee Bill of 1853. The congressional intent found relevant by the Supreme Court in *Alyeska* also governs here. The 1853 Act "specif[ied] in detail the nature and amount of the taxable items of costs in the federal courts." *Alyeska*, 421 U.S. at 252. The Act did not permit the taxing of excess "solicitor and client" costs. *Id.* at 258 n.30. Congress has not since "retracted, repealed or modified the limitations on taxable fees contained in the 1853 statute and its successors." *Id.* at 260. Just as Congress in the Fee Bill of 1853 extended no "roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Id.*, so too Congress extended no "roving authority" to allow expert witness' fees in excess of the amount specifically provided for by statute.[6]

Further, numerous statutes expressly allow federal courts to award the full amount of expert witness' fees as costs of litigation.[7] Given Congress' ability to provide

[6] Section 1920(6) allows the court to tax as costs the compensation of court-appointed experts. Our holding today recognizes that § 1920(6) acts in effect as a safety-valve, permitting the full compensation of court-appointed expert witnesses to be taxed as costs after notice and an opportunity to object to their appointment by the court.

[7] At least twenty-eight statutes provide for the taxing of expert witness' fees as costs in civil actions, albeit under varying standards: (1) Consumer Product Safety Act, 15 U.S.C. §§ 2060(c) (action for review of consumer product safety rule). 2072(a) (action by person injured by one in knowing violation of consumer

explicitly for the taxing of excess expert witness' fees as costs, we should not infer congressional intent to award

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product safety rule). 2073 (action for enforcement of consumer product safety rule); (2) Toxic Substances Control Act, 15 U.S.C. §§ 2618(d) (action for review of rule regulating toxic substances), 2619(c)(2) (citizen's action to compel compliance with regulations controlling toxic substances), 2620(b)(4)(C) (action to compel initiation of rulemaking proceeding regarding toxic substance); (3) Petroleum Marketing Practices Act, 15 U.S.C. § 2805(d)(3) (action to enforce provisions governing franchise relationship in petroleum marketing practice); (4) National Historic Preservation Act Amendments of 1980, 16 U.S.C. § 470w-4 (action for enforcement of provisions regarding national historic preservation; (5) Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) (citizen's action to compel compliance with provisions concerning endangered species); (6) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632(a)(1) (proceeding involving electric utility); (7) Tax Equity and Fiscal responsibility Act of 1982, 26 U.S.C. § 7430(a), (c)(1)(A)(ii) (action brought by or against United States in connection with determination, collection, or refund of any tax, interest, or penalty under Internal Revenue Code); (8) Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(A) (as amended by Pub. L. 99-80, 99 Stat. 184, 186) (any non-tort civil action brought by or against United States); (9) Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d) (civil action to compel compliance with provisions governing surface mining and reclamation); (10) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) (civil action for equitable relief against person in violation of provisions regulating exploration and commercial recovery by U.S. citizens of deep seabed hard mineral resources); (11) Federal Oil and Gas Royalty Management Act of 1982, 30 U.S.C. § 1734(a)(4) (state action to recover royalty, interest, or civil penalty with respect to any oil and gas lease on federal lands located within the state); (12) Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 928(d) (action for recovery of compensation under LHWCA); (13) Federal Water Pollution Control Act, 33 U.S.C. § 1365(d) (citizen's action against person in violation of water pollution prevention and control provisions); (14) Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g)(4) (citizen's suit against person in violation of ocean dumping standards); (15) Deepwater Ports Act of 1974, 33 U.S.C. § 1515(d) (citizen's action against persons in violation of deepwater port provisions); (16) Act to Prevent Pollu-

such costs in the absence of an express statute so providing. Moreover, a statute which provides only for an

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tion from Ships, 33 U.S.C. § 1910(d) (actions authorized by provisions governing prevention of pollution from ships); (17) Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) (action to compel compliance with provisions concerning the safety of public water systems); (18) Noise Control Act of 1972, 42 U.S.C. § 4911(d) (citizen's suit to compel compliance with noise control provisions); (19) Energy Reorganization Act of 1974, 42 U.S.C. § 5851(e)(2) (action for protection of employee of the NRC, an NRC licensee, an applicant for an NRC license, or a contractor or subcontractor of an NRC licensee or applicant); (20) Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) (citizen's action to compel compliance with provisions concerning the energy conservation program for consumer products other than automobiles); (21) Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6972(e) (citizen's action to compel compliance with provisions regarding solid waste disposal); (22) Clean Air Act, 42 U.S.C. §§ 7413(b) (action brought by EPA administrator against owner or operator of major stationary source of air pollution in violation of provisions concerning air pollution prevention), 7604(d) (citizen's suit to require compliance with provisions concerning air pollution prevention), 7607(f) (action for review of rules promulgated by EPA administrator concerning air pollution prevention); (3) Clean Air Act Amendments of 1977, 42 U.S.C. § 7622(b)(B), (e)(2) (action for protection of employee assisting in proceeding enforcing provisions on air pollution prevention); (24) Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. § 8435(d) (citizen's suit to compel compliance with provisions governing power plant and industrial fuel use); (25) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. § 9124(d) (citizen's action to compel compliance with provisions regarding ocean thermal energy conversion); (26) Outer Continental Shelf Lands Act Amendments of 1978, 43 U.S.C. § 1349(a)(5) (action to compel compliance with provisions governing Outer Continental Shelf leasing program); (27) Natural Gas Pipeline Safety Act, 49 U.S.C. § 1686(e) (citizen's action against persons in violation of provisions concerning natural gas pipeline safety); (28) Hazardous Liquid Pipeline Safety Act of 1979, 49 U.S.C. § 2014(e) (citizen's action against persons in violation of provisions concerning hazardous liquid pipeline safety).

Further, at least three other statutes expressly provide for the taxing of expert witness' fees as costs in administrative proceedings: (1) Federal Trade Commission Improvement Act, 15 U.S.C.

award of "costs" or "attorneys' fees" but which fails to address expert witness' fees will not be construed to authorize the taxing of expert witness' fees in excess of the § 1821 amount.

The Supreme Court's holding in *Farmer v. Arabian American Oil Co.*, 379 U.S. 227 (1964), does not command a rule different from that today announced. *Farmer* presented the Supreme Court with the question whether, in view of Rule 45(e)'s command that witnesses cannot be compelled to travel more than 100 miles, a party who procured their voluntary attendance by paying the witnesses' transportation expenses could have those expenses taxed as costs against a defeated adversary. The Supreme Court held that the trial court did not abuse its discretion under Rule 54(d) in refusing to tax certain items as cost. In dicta, the court explained: "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses *not specifically allowed by statute.*" *Farmer*, 379 U.S. at 235 (emphasis added). Whatever import this quoted language carries for the assessment of expenses *not specifically allowed by statute*, it is not relevant here, for expert witness' fees have been comprehensively dealt with by Congress in § 1920 and § 1821. In addition, the Court in *Farmer* upheld the exercise of the district court's discretion under Rule 54(d) to *refrain* from taxing certain expenses as costs; to rely on *Farmer* to justify the affirmative taxing of witness' costs in excess of the § 1821 amount would turn *Farmer* on its head.

We overrule those portions of our prior opinions suggesting standards for the taxing of excess expert witness'

§ 57a(h)(1) (participation in rulemaking proceedings of Federal Trade Commission regarding unfair or deceptive acts or practices); (2) Toxic Substances Control Act, 15 U.S.C. § 2605(c)(4)(A) (participation in rulemaking proceeding regarding hazardous chemical substances and mixtures); (3) Public Utility Regulatory Policies Act of 1978, 16 U.S.C. §825q-1(b)(2) (proceedings before Office of Public Participation).

fees different from that now adopted. In *Jones v. Diamond*, we acknowledged that expert witness' fees were generally recoverable only in the amount prescribed by § 1821, but determined nevertheless that "Congress had manifested an intention that a different rule be applied for civil rights plaintiffs." 636 F.2d at 1382. District courts had "in many instances" awarded "the full fees of experts on the ground that their testimony and assistance were necessary or helpful in representing clients in civil rights litigation." *Id.* As noted by the *Jones* dissent, however, the majority cited no act of Congress to support its decision, but relied only on a single sentence from "a Senate Report concerning legislation which could have contained . . . a provision [authorizing the award of excess expert witness' fees as costs] but *did not.*" *Id.* at 1391 (Coleman, C.J., dissenting) (emphasis in original). The single cited sentence in the Senate Report does not authorize the taxing of excess expert witness' fees as costs, and the *Jones* holding on excess expert witness' fees cannot stand in light of the rule announced today.

In *Copper Liquor III*, an antitrust case, we indicated in a part of the opinion entitled "Section 1920 Costs" that trial courts had discretion to award excess expert witness' fees in "exceptional circumstances, for example, when the expert testimony was necessary or helpful to the presentation of civil rights claims, or indispensable to the determination of the case." 684 F.2d at 1100 (footnotes omitted). This conclusion that § 1920 authorizes the award of excess expert witness' costs in "exceptional circumstances" is overruled.[8]

[8] We also overrule that portion of *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982), in which we relied on *Jones* to find an abuse of discretion in the district court's failure to assess as an item of costs the full fee of an expert witness who was "important" to the plaintiff's § 1983 case. Our holding on excess expert witness' fees in *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1029, 1033 (5th Cir. 1983), also cannot stand in light of the rule adopted above.

III.

Given the principles set out in Part II of this opinion, we now affirm, albeit on different grounds, the district court's denial of expert witness' fees in excess of the amount provided for in 28 U.S.C. § 1821. The statutes applicable here, 42 U.S.C. § 1988 and § 2000e-5(k), provide for the award of attorneys' fees to prevailing parties, but make no mention of excess expert witness' fees. None of the equitable exceptions to the American Rule is here claimed. Champion thus must content itself with the amount recoverable for expert witnesses under § 1821.

IV.

We hold that the fees of non-court-appointed expert witnesses are taxable by federal courts in non-diversity cases only in the amount specified by § 1821, except that fees in excess of that amount may be taxed when expressly authorized by Congress, or when one of the three narrow equitable exceptions recognized by *Alyeska* applies. We direct the district courts in the exercise of our supervisory power to apply the rule announced today to all pending cases.

For the above reasons, the judgment of the district court is AFFIRMED.

No. 83-4616 *International Woodworkers v. Champion*

No. 84-3332 *Gibbons v. Crawford Fitting Company*

ALVIN B. RUBIN, J., concurring in the result in *International Woodworkers of America v. Champion International Corp.*, and dissenting in *J.T. Gibbons, Inc. v. Crawford Fitting Co., et al.**

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* Judges Wisdom, Johnson, and Williams join in Judge Rubin's opinion concurring in the result in *International Woodworkers of America v. Champion International Corp.*, and Judges Goldberg, Johnson, and Williams join in his dissent in No. 84-3332—*J. T. Gibbons, Inc. v. Crawford Fitting Company, et al.*

The majority opinion today fashions a rule that has not been adopted by any other circuit. It applies that rule to the recovery of expert witness fees without considering the recoverability of other litigation expenses. And it applies that rule without distinction to two dissimilar cases in which the recovery of expert witness fees is sought on completely different bases. In *Woodworkers*, a defendant who was the prevailing party in an employment discrimination suit requests expert witness fees as a litigation expense incidental to an award of attorney's fees authorized by The Civil Rights Attorney's Fees Awards Act of 1976. 42 U.S.C. § 1988. In *Gibbons*, the defendant who prevailed in an antitrust suit invokes the court's discretion under Federal Rule of Civil Procedure 54(d) to recover costs, including the fees of expert witnesses for courtroom testimony.

Each of these cases involves a different question. When a statute authorizes an award of attorney's fees to the prevailing party in addition to costs, as in *Woodworkers*, that party should not be denied the right to recover all those expenses for which an attorney would normally bill his client. There is no reason to distinguish, in this respect, between expert witness fees and the myriad other costs incident to litigation that are incurred by a lawyer and billed to his client. While the majority deals expressly only with expert witness fees, the effect of its rationale must inevitably extend to a denial of all other costs of litigation, save reimbursement for the personal services of the lawyer and for those limited costs specified in 28 U.S.C. § 1920.

If, like the victor in *Gibbons*, the prevailing party does not have a statutory right to recover attorney's fees, he may not recover either his lawyer's fees or his lawyer's expenses, but he may request that the district court exercise its discretion under Rule 54(d) to award the costs of litigation, including the fees paid to experts for testifying in court.

Neither the court's general discretion to tax costs, nor its determination of which expenses to include in a statutorily authorized award of attorney's fees is, or should be, governed by the standards that define the court's equitable powers to award attorney's fees, as summarized in *Alyeska Pipeline Service Co. v. Wilderness Society.*[1] The application of a single rule to both kinds of cases obliterates the important differences between them and risks overriding Congress' intent in authorizing civil rights attorney's fees.

The majority's rule produces illogical results: Absent a fee-shifting statute, expert witness fees may be recovered when (and only when) attorney's fees would be permitted under the *Alyeska* rule. If, however, Congress has enacted a statute explicitly authorizing the award of attorney's fees in an effort to shift the burden of litigation expenses from the prevailing party to the wrongdoer, expert witness fees are not recoverable even though attorney's fees are.

I.

Both cases before us are affected, although not resolved, by the statutes that govern the taxation of costs in federal courts. 28 U.S.C. § 1920, set forth in full in the footnote,[2]

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[1] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[2] 28 U.S.C. § 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
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> (1) Fees of the clerk and marshal;
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> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
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> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title;

lists certain costs that courts are permitted to tax. Its language is neither mandatory nor exclusive. It permits the taxing of fees for court-appointed expert witnesses, and the taxing of limited costs for ordinary witnesses, set by 28 U.S.C. § 1821 at thirty dollars per day plus a travel allowance. Section 1920 does not mention fees for expert witnesses except for those appointed by the court. The significance of this omission for the two cases before us depends on a careful review of the questions they present.

The prevailing defendant in *Woodworkers* seeks to recover both attorney's fees and expert witness fees under The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.[3] That statute authorizes the court, "in its discretion," to "allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *Woodworkers*, therefore, poses a question of statutory interpretation: Did Congress, in enacting § 1988, intend to allow a prevailing party compensation only for fees actually paid to the lawyer himself for legal services rendered, in addition to the routinely recoverable costs listed in § 1920, or did it also intend to allow recovery of the attorney's expenses and other necessary and reasonable costs of litigation?

Gibbons, however, poses a different question. That suit was brought under the Clayton Act, which permits the award of costs and attorney's fees only to a prevailing plaintiff.[4] A victorious defendant may recover costs only by invoking the court's general discretion under Federal Rule of Civil Procedure 54(d). The question presented, therefore, is whether the court's discretion permits the

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> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.
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> A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

[3] 42 U.S.C. § 1988 (1982).

[4] 15 U.S.C. § 15 (1982).

award of expert witness fees, and if so, whether the court abused its discretion in this case.

II.

Section 1988 should be interpreted, I submit, to include within the phrase "attorney's fees as part of the costs" not only fees for a lawyer's services and those costs specified in § 1920, but all of the reasonable expenses of litigation that a privately retained lawyer would usually bill to his client.[5] The Act's legislative history makes clear that an attorney who recovers his fee under § 1988 should receive neither more nor less than an attorney who is paid by his client. This means that office overhead and secretarial expense, normally paid by the attorney out of his fee, whether fixed at a stated amount, or calculated hourly or on some other basis, should not be awarded separately. However, the court should award other reasonable and necessary costs that an attorney incurs and normally bills separately to the client, such as travel costs, long-distance telephone bills, fees paid to consultants, the costs of preparing exhibits, and any other of the multitudinous expenses of litigation.

Expert witness fees are not so singular as to be treated differently from all other litigation expenses. A court's authority to award these expenses comes neither from the equitable powers described in *Alyeska Pipeline Service Co. v. Wilderness Society*,[6] nor from the courts' limited authority under § 1920, nor from its general discretion pursuant to Rule 54(d), but from The Civil Rights Attorney's Fees Awards Act itself, and from Congress' unequivocal statement of the Act's purpose.

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[5] One commentator has suggested that § 1920 should limit the amounts of costs awarded incident to attorney's fees for the basic categories of costs that the statute covers. *See* Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 FRD 553, 595-96 (1984).

[6] 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

Although the statute explicitly refers only to the award of attorney's fees, Congress made clear that attorneys were to be paid "as is traditional with attorneys compensated by a fee-paying client."[7] As the Act's sponsor, Representative Drinan, stated during the House debate, "I should add that *the phrase 'attorney's fee' would include . . . all incidental and necessary expenses incurred in furnishing effective and competent representation.*"[8] These remarks are consistent with the frequent observation that private enforcement of the civil rights laws depend on the citizens' "opportunity to recover what it costs them to vindicate these rights in court."[9] To fulfill its purpose, the Act necessarily authorized reimbursement for all the resources necessary for "*effective access* to the judicial process."[10] "Congress must insure [that civil rights litigants] have the means to go to court and *to be effective once they get there*,"[11] because "[i]f the cost of private enforcement actions becomes too great, there will be no private enforcement."[12] And, if prevailing plaintiffs or their attorneys must bear the burden of prohibitive expert witness fees, the civil rights laws will be enforced either less frequently or less effectively than Congress intended.

Although *Woodworkers* involves a prevailing civil rights defendant unaffected by these policy considerations, the statute does not distinguish between prevailing parties

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[7] S. Rep. No. 1011, 94th Cong. 2d Sess. 6 (1976).

[8] 122 Cong. Rec., 35,123 (1976) (emphasis added).

[9] S. Rep. No. 1011, 94th Cong. 2d Sess. 2 (1976); *see also, e.g.*, 122 Cong. Rec. 31,471, 33,313 (1976).

[10] H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) (emphasis added).

[11] 122 Cong. Rec. 33,313 (1976) (emphasis added).

[12] S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976). *See also Evans v. Jeff O.*, —— U.S. ——, —— 54 U.S.L.W. 4359, 4367-68 (1986) (Brennan, J., dissenting).

as to the expenses that are reasonable, and *Christiansburg Garment Co. v. E.E.O.C.*[13] requires that, when the complaint brought proves to be frivolous or unfounded, the defendant must be awarded whatever expenses the plaintiff might have recouped. The rule propounded by the majority today in the case of a prevailing civil rights defendant applies equally to victorious civil rights plaintiffs. Although today's application of the rule affronts no congressional policy, its primary effect in the future will be seen in the financial handicap it imposes on the civil rights plaintiffs that Congress sought to assist.

As the Eleventh Circuit has written in *Dowdell v. City of Apopka, Fla.*:

> Reasonable attorneys' fees under the Act must include reasonable expenses because attorneys' fees and expenses are inseparably intertwined as equally vital components of the costs of litigation. The factually complex and protracted nature of civil rights litigation frequently makes it necessary to make sizeable out-of-pocket expenditures which may be as essential to success as the intellectual skills of the attorneys. If these costs are not taxable, and the client, as is often the case, cannot afford to pay for them, they must be borne by counsel, reducing the fees award correspondingly.
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> * * * *
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> . . . [I]f the real income of civil rights litigators is decreased because they must absorb costs which are generally billable in other types of cases, the market result will be to channel attorneys toward more remunerative types of litigation. Decreasing the supply of attorneys necessarily decreases the access to the courts of victims of civil rights violations.[14]

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[13] 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

[14] 698 F.2d 1181, 1190-91 (11th Cir. 1983).

III.

The linchpin of the majority opinion is its conclusion that expert witness fees are sufficiently analogous to attorney's fees that both should be controlled by the guidelines set out in *Alyeska*. Despite this perceived analogy, the majority denies that Congress might have intended expert witness fees and other out-of-pocket expenses to be included as incidental expenses within an award of attorney's fees or costs. In so holding, the majority takes a path inconsistent with that chose by every other circuit. It supports this novel result by reasoning that, because Congress has expressly provided for the award of expert witness fees in some statutes, it must therefore have intended to exclude them in all other instances, and by finding that the word "costs" refers only to those limited costs specified in § 1920.

The fact that Congress has expressly mentioned expert witness fees in addition to attorney's fees and costs in more recently adopted expense-shifting statutes does not persuade me that the fee-shifting phrases in the Civil Rights Act, the Clayton Act, and all other earlier enacted statutes were intended to exclude them. Over two-thirds of the statutes cited by the majority were enacted within the last ten years, and all were enacted within the last fifteen. Consequently, I do not find them determinative of the intent that Congress had when it enacted such statutes as the Clayton Act a hundred years ago, long before expert witness fees became so substantial and common-place as to warrant express reference. Neither should such interpretation by negative implication override the explicit legislative history of a more recently enacted statute, such as the Civil Rights Attorneys' Fees Awards Act.

Circuit courts from every circuit, in cases arising under § 1988, have allowed the prevailing party to recover expert witness fees or other expenses of litigation not enu-

merated in § 1920, either as costs or as part of attorney's fees: [15]

The First Circuit, in *Palmigiano v. Garrahy*,[16] approved the inclusion of all reasonable and necessary expenses in awards of attorney's fees under § 1988.

The Second Circuit, in *Beazer v. New York City Transit Authority*,[17] awarded the expenses of a pre-trial hearing and trial preparation under § 1988.

The Third Circuit, in *Wehr v. Burroughs*,[18] has awarded LEXIS charges as a reasonable expense of litigation included within an award of attorney's fees.

The Fourth Circuit, in *Wheeler v. Durham City Board of Education*,[19] approved the award of copying, long distance telephone and travel expenses, along with all other out-of-pocket expenditures by a successful civil rights attorney.

In *Berry v. McLemore* [20] and *Jones v. Diamond*,[21] cases the majority today overrules, this circuit has awarded expert witness fees under § 1988.

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[15] *See generally*, Bartell, *supra* note 5 (collecting cases in addition to those cited here).

[16] 707 F.2d 636, 637 (1st Cir. 1983). *Cf. Wildman v. Lerner Stores Corp.*, 771 F.2d 605, 612, 614 (1st Cir. 1985).

[17] 558 F.2d 97, 100 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 568, 99 S.Ct. 1355, —— L.Ed.2d —— (1979).

[18] 619 F.2d 276, 284 (3d Cir. 1980); *see also Walker v. Robbins Hose Co.*, 622 F.2d 692, 694-95 (3d Cir. 1980); *Id.* at 695-97 (Sloviter, J., dissenting).

[19] 585 F.2d 618, 623-24 (4th Cir. 1978).

[20] 670 F.2d 30, 34 (5th Cir. 1982). *See also Richardson v. Byrd*, 709 F.2d 1016, 1023 (5th Cir.), *cert. denied*, —— U.S. ——, 104 S.Ct. 257, —— L.Ed.2d —— (1983) (awarding paralegal fees).

[21] 636 F.2d 1364, 1382 (5th Cir.), *cert. denied*, 453 U.S. 950, 102 S.Ct. 27, 69 L.Ed.2d 1033 (1981).

The Sixth Circuit, in *Northcross v. Board of Education of Memphis City Schools*,[22] held that, although costs such as expert witness fees that were paid to third parties could not be considered part of attorney's fees, all other out-of-pocket expenses normally billed to a fee paying client should be included in § 1988 fee awards. The court approved the award of expert witness fees under the district court's Rule 54(d) discretion, independent of the attorney's fee statute.

The Seventh Circuit has frequently addressed the issue, permitting the award of all reasonable and necessary costs of litigation in *Redding v. Fairman*,[23] and specifically approving the award of expert witness fees under § 1988 in *Heiar v. Crawford County* [24] and in *Strama v. Peterson*.[25] Other Seventh Circuit cases have permitted the award of telephone, postage, copying, deposition, and travel expenses,[26] paralegals' hourly fees,[27] or simply "all reasonable out-of-pocket litigation expenses." [28]

The Eighth Circuit, in *Easley v. Anheuser-Busch, Inc.*,[29] has awarded expert witness fees for in-court testimony and, in *American Family Life Assurance Co. v. Teasdale*,[30] for pre-trial consultations. It has also approved

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[22] 611 F.2d 624, 639-40 (6th Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2999, 64 L.Ed.2d 862 (1980).

[23] 717 F.2d 1105, 1119 (7th Cir. 1983), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1282, —— L.Ed.2d —— (1984).

[24] 746 F.2d 1190, 1203-04 (7th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 3500, —— L.Ed.2d —— (1985).

[25] 689 F.2d 661 (7th Cir. 1982).

[26] *Heiar, supra*; *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1282 (7th Cir. 1983); *Strama, supra*.

[27] *Heiar, supra*; *Strama, supra*.

[28] *Henry v. Webermeier*, 738 F.2d 188, 192 (7th Cir. 1984).

[29] 758 F.2d 251, 257 (8th Cir. 1985).

[30] 733 F.2d 559, 571 (8th Cir. 1984).

the award of all reasonable out-of-pocket expenses under § 1988.[31]

The Ninth Circuit, in *Thornberry v. Delta Airlines, Inc.*,[32] awarded paralegal expenses, the costs of travel, and all out-of-pocket expenses under § 1988. It adopted the position of the Sixth Circuit in *Northcross*, allowing expert witness fees and other third-party payments to be awarded under Rule 54(d) rather than under § 1988.

The Tenth Circuit, in *Ramos v. Lamm*,[33] awarded similar costs, including expert witness fees, and approved the award of all costs that would normally be billed separately to clients by a typical law firm in the area.

As I have already noted, in *Dowdell v. City of Apopka, Fla.*,[34] the Eleventh Circuit awarded all reasonable expenses not normally absorbed by the attorney as overhead,[35] even though it does not allow similar expenses to be awarded under Rule 54(d) discretion.[36] The Court wrote "[w]e reject any interpretation of "reasonable costs" which would penalize attorneys for undertaking civil rights litigation. 'No one expects a policemen, or an office holder, to pay for the privilege of enforcing the law.' "[37] And the District of Columbia Circuit has held,

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[31] *Id.*

[32] 676 F.2d 1240, 1244-45 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, 103 S.Ct. 2421, 77 L.Ed.2d 1311 (1983).

[33] 713 F.2d 546, 558-60 (10th Cir. 1983).

[34] 698 F.2d 1181, 1188-92 (11th Cir. 1983) (quoting remarks of Sen. Tunney, 122 Cong. Rec. 33,313 (1976)).

[35] *See also Allen v. U.S. Steel Corp.*, 665 F.2d 689, 696-97 (11th Cir. 1982) (deposition and paralegal expenses).

[36] *See, e.g., Loughan v. Firestone Tire & Rubber Co.*, 749 F.23 1519 (11th Cir. 1985); *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983).

[37] 698 F.2d at 1191.

in *Laffey v. Northwest Airlines, Inc.*,[38] that § 1988 authorizes the award of all reasonable costs normally passed on to clients. The court wrote

> [W]e need not attempt to trace an unwavering line between those out-of-pocket expenses which are compensable and those which are not. The line of division—as with the hourly rate—should fall where the market has placed it. Some law firms routinely pass such costs on; others charge slightly higher fees and absorb those costs. It would grant a windfall to attorneys to reimburse them for expenses which normally are absorbed as part of their overhead; it would penalize them to deny compensation for expenses which they expect to pass directly to clients. The appellees are entitled to these costs upon showing that such costs are of a type passed on by the firms involved to private clients.[39]

Until today, no circuit has limited the award of litigation expenses incidental to attorney's fees under § 1988 to the costs enumerated in § 1920.[40] None has found reason to treat expert witness fees as sui generis, and none has applied *Alyeska* in this context.

IV.

The majority takes *Alyeska* as its guide, although that case does not reach, and certainly does not determine, the question of what adjuvant expenses may be included within a statutorily authorized award of attorney's fees. The *Alyeska* Court refused "to fashion a far-reaching exception to [the] 'American Rule' "[41] that would permit

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[38] 746 F.2d 4, 30 (D.C. Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 3488, —— L.Ed.2d —— (1985).

[39] *Id.*

[40] *See also* Bartell, *supra* note 5 at 589-96.

[41] 421 U.S. at 247, 95 S.Ct. at 1616.

district courts to award attorney's fees *without statutory authorization* whenever a plaintiff, acting as a "private attorney general," vindicated a statutorily endorsed public policy. The Court held only that Congress, not federal courts, must dictate which statutes, when enforced by private citizens, warrant the recovery of attorney's fees.

The *Alyeska* opinion refers to § 1920 in recounting the history of the American courts' authority to award attorney's fees. It traces the present version of § 1920 back to an 1853 statute that permitted certain enumerated costs, "and no other compensation [to] be taxed and allowed to attorneys." [42] The Court suggests in footnote dicta that, although there is no similar language in the present version of § 1920, "nothing . . . indicates a congressional intention to depart from" the exclusion of other costs and fees mandated by the 1853 rule.[43]

Immediately thereafter, the Court adds that neither the 1853 statute nor any of its successors have been construed to interfere "with the historic power of equity" to award *attorney's fees* in limited circumstances, such as for the recovery of a common fund, willful disobedience of a court order, or bad faith litigation.[44] The Court does not imply that these examples bound a court's equitable powers to tax the costs of litigation. It concludes only that these three exceptions "are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, [and that] none of the exceptions is involved here." [45]

Attorney's fees are not synonymous with costs, and the Supreme Court has long ago held that the 1853 attorney's

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[42] *Id.* at 253, 95 S.Ct. at 1620.

[43] *Id.* at 255 nn. 28 & 29, 95 S.Ct. at 1621 nn. 28 & 29.

[44] *Id.* at 257-58, 95 S.Ct. at 1621-22. (emphasis added).

[45] *Id.* at 259, 95 S.Ct. at 1622.

fee statute does not deal "expressly or by implication with the subject of taxing as costs the expense of [experts or stenographers]." [46] The *Alyeska* dictum does not require us to limit the costs that a district court may tax to those enumerated in § 1920, and *Alyeska* clearly has no bearing on fee awards authorized by statute.

Recourse to *Alyeska* is particularly inappropriate in § 1988 cases. As the legislative history of that section repeats time and again, § 1988 was enacted expressly to counteract the effect of the *Alyeska* decision.[47] The House Report notes that "civil rights litigants were suffering very severe hardships because of the *Alyeska* decision," [48] that its effect was "devastating," and that it might "as a practical matter, repeal the civil rights laws for most Americans." [49] Similarly, the Senate Report begins by stating that the Act was intended to remedy the gaps created in our civil rights laws by *Alyeska*.[50] To impose the limitations and policies of *Alyeska* on fee awards under § 1988 is to disregard entirely the primary congressional purpose behind its enactment. The traditional limitations of the American Rule, of *Alyeska*, of § 1920, and of Fed. R. Civ. P. 54(d) do not apply to awards made pursuant to § 1988, because that statute is based upon policies antithetical to those restrictions.[51]

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[46] *In re Peterson*, 253 U.S. 300, 317, 40 S.Ct. 543, 549, —— L.Ed. —— (1920); *see also Newton v. Consolidated Gas Co.*, 265 U.S. 78, 83, 44 S.Ct. 481, 482-83, —— L.Ed. —— (1924).

[47] *See, e.g.*, S. Rep. No. 1011, 94th Cong., 2d Sess. 1, 4-6 (1976); H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2-3 (1976); 122 Cong. Rec. 31,472, 31,474, 33,314, 35,122-28 (1976). *See also Evans v. Jeff O.*, —— U.S. ——, ——, 54 U.S.L.W. 4359, 4367-68 (1986) (Brennan, J., dissenting).

[48] H.R. Rep. No. 1558, 94th Cong., 2d Sess. 2 (1976).

[49] 122 Cong. Rec. 35,128 (1976).

[50] S. Rep. No. 1011, 94th Cong., 2nd Sess. 1 (1976).

[51] *Dowdell*, 698 F.2d at 1189 n.12 (11th Cir. 1983).

V.

In *Christiansburg Garment Co. v. E.E.O.C.*,[52] the Supreme Court held that a prevailing civil rights defendant should be awarded attorney's fees under § 1988 only when the plaintiff's suit was frivolous, unreasonable, or unfounded.

The majority decides that, because a fee-shifting statute applies in *Woodworkers*, and because the statute does not expressly permit expert witness fees, the court has no authority to award them, presumably not even under the *Alyeska* criteria which are to be applied in the absence of a fee-shifting statute. The majority ignores the similarity between the *Alyeska* standard of vexatious or oppressive actions and the *Christiansburg* standard of unfounded or vexatious litigation: expert witness fees that might have been taxed to the plaintiff for bringing an unfounded tort suit may no longer be taxed for bringing an equally unfounded civil rights or employment discrimination action. Even if Congress did not intend that expert witness fees be awarded as a component of attorney's fees, as I believe it did, it surely did not intend by its reference to attorney's fees to lessen the courts' general authority to award other costs as deterrent to frivolous litigation. Yet that is the result of the majority's rule.

I believe that the *Woodworkers* district court reached the right result for the right reasons. It found that the suit had a reasonable basis and applied *Christiansburg* to deny the defendant attorney's fees. It properly applied the same standard and invoked the same discretion to deny expert witness fees that might have constituted a reasonable expense incidental to the award of attorney's fees. And although, for reasons, I will discuss in the next section, the court also had discretion under Rule

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[52] 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978).

54(d) to tax expert witness fees as costs, the prevailing defendant did not seek an award on this basis. The court's denial of the award should, therefore, be affirmed.

VI.

Had the plaintiff prevailed in *Gibbons*, it would have been entitled both to treble damages and "the cost of suit, including a reasonable attorney's fee." [53] The rule adopted by the majority would not permit such a successful plaintiff to recover expert witness fees and, I submit, by inexorable logical extension, any other out-of-pocket expenses not enumerated in § 1920 for which the plaintiff's counsel would normally have billed his client. Although some circuit courts have reached the same result in Clayton Act litigation, this seems to me to be incorrect. Allowing a prevailing party treble damages, attorney's fees, and even, at times, prejudgment interest, but denying recovery of all of the other expenses incident to litigation is anomalous. There would be no reason to specify by statute that the cost of suit might be awarded if those costs referred only to the expenses ordinarily taxed to the loser. As Professor Moore points out, "had Congress intended 'cost of suit' [in the Clayton Act] to include only taxable costs, it would have said so." [54]

In *Gibbons*, however, the defendant prevailed and no statutory fee-shifting provision entitled it to attorney's fees. In the absence of any other provision, Fed. R. Civ. P. 54(d) controls. It is succinct:

> Except when express provision therefore is made either in a statute of the United States or in these rules costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . .

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[53] 15 U.S.C. § 15 (1982).

[54] 6 J Moore, W. Taggart & J. Wicker, Moore's Federal Practice § 54.71[3] (2d ed. 1982).

That rule does not define the term "costs." The majority construes it to restrict the definition of "costs" to those costs specified in § 1920. It does so by finding that § 1920 is an express statutory provision that governs, and provides the exclusive authority for, the award of expert witness fees, obviating the discretion allowed by Rule 54(d), and prohibiting the taxing of any costs not listed therein.

Section 1920 does not on its face purport to be exclusive. It does not say, "only the following costs" shall be allowed. Neither does it provide expressly for the taxing of expert witness fees. Its phrasing is permissive because it was revised, after enactment of the Federal Rules, in recognition of the discretion that Rule 54(d) affords.[55] It is not, therefore, the kind of "express provision" that is an exception according to the terms of Rule 54(d). If it were, then § 1920 would control every case, and Rule 54(d) would be completely redundant, without any independent force or meaning.

Even if the majority were correct in holding that § 1920 is exclusive, the majority does not follow this interpretation to its logical conclusion, for the majority holds that, in the exceptional circumstances borrowed from *Alyeska*, *§ 1920 does not apply* and some other unspecified authority affords the court broader discretionary powers. If, on the other hand, the majority means that § 1920 is not *always* exclusive, then it fails to explain how § 1920 can abrogate the discretion Rule 54(d) appears to give, and why expert witness fees should be treated differently from all other costs.

Those circuits that have refused to permit the taxation of expert witness fees under Rule 54(d) have, like the majority, relied on a 1932 Supreme Court decision, *Henkel v. Chicago, St. Paul, Minneapolis & Omaha Railway*,[56]

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[55] 1948 United States Code Congressional Service 1887-88 (80th Cong., 2d Sess.).

[56] 284 U.S. 444, 52 S.Ct. 223, —— L.Ed. —— (1932).

in which the Court wrote that expert witness fees were included within, and limited to, the per diem and travel allowances for ordinary witnesses in 28 U.S.C. §§ 600(a) & (c) (precursors of 28 U.S.C. §§ 1920 & 1821). The Court held that federal courts had no authority, either in their discretion or under state law, to award as costs compensation to witnesses in excess of the statutory amount.[57]

Although the issue in *Henkel* was the same as that now presented, the district court powers that it described have since changed. *Henkel* was decided before the adoption of the Federal Rules of Civil Procedure and before the merger of actions at law and equity. It was written in answer to a certified question inquiring whether district courts had the authority to tax expert witness fees as costs in a case at law. At that time, courts sitting in law had no power to award costs not expressly granted by statute.[58] At equity, as *Alyeska* affirms, courts have always retained the power to award fees not specified by statute.[59] With the merger of law and equity, Rule 54(d) gave federal courts in all actions the broader discretion previously afforded only to courts of equity. As Judge Frank wrote:

> [Rule 54(d)] appears to have adopted, for all suits covered by it, the previous federal practice in equity, according to which the trial court had wide discretion in fixing costs, a discretion not reviewable unless manifestly abused. . . .[60]

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[57] *Id.* at 446, 52 S.Ct. at ——.

[58] *See* 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665, at 170 (2d ed. 1983); Payne, Costs in Common Law Actions in the Federal Courts, 21 Va. L. Rev. 397, 399-400 (1935).

[59] *See Supra* note 53. *See also In re Peterson*, 253 U.S. 300, 316, 40 S.Ct. 543, 548 (1920).

[60] *Harris v. Twentieth Century Fox Film Corp.*, 139 F.2d 571, 572 n.1 (2d Cir. 1943); *see also Cox v. Maddox*, 285 F. Supp. 876, 879 (E.D. Ark. 1968); *Farrar v. Farrar*, 106 F. Supp. 238, 241 (W.D.

This conclusion is confirmed by Wright & Miller who state that Rule 54(d) today "makes the allowance of costs discretionary and, thus, adopts the practice formally followed in equity rather than at law." [61]

Since the adoption of Rule 54(d), the Supreme Court has only once addressed the district courts' power to tax costs, and the majority fails to consider fully the significance of that decision. *Farmer v. Arabian American Oil Company* [62] makes clear that Rule 54(d) authorizes a court, in its discretion, to tax costs in excess of those mentioned in § 1920. As several circuits have noted, it modifies the lingering effect of *Henkel.*[63]

In *Farmer*, no fee-shifting statute applied. The district court had refused to tax as costs litigation expenses for witness travel and overnight transcripts. While the Supreme Court affirmed this disallowance, the Court did not rest its decision on a determination of whether § 1920 permitted these costs or on some other rule limiting the taxation of costs. Instead it relied only on Rule 54(d), saying:

> We do not read [Rule 54(d)] as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. . . . [T]he discretion given district

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Ark. 1952); *Andresen v. Clear Ridge Aviation*, 9 F.R.D. 50 (D. Neb. 1949); *Abel v. Loughman*, 1 F.R.D. 734 (E.D. N.Y. 1941); 4 C. Wright & A. Miller Federal Practice and Procedure: Civil § 1044 at 152.

[61] 10 C. Wright, A. Miller & M. Kane, Federal Practice & Procedure § 2665, at 171 (2d ed. 1983).

[62] 379 U.S. 227, 85 S.Ct. 411, —— L.Ed.2d —— (1964).

[63] *See, e.g., Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338 (8th Cir. 1982), *rev'd on other grounds*, 727 F.2d 692 (1984); *Roberts v. S.S. Kyriakoula O. Lemos*, 651 F.2d 201, 206 (3d Cir. 1981).

> judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute.[64]

The Court's conclusion reveals its premise: Rule 54(d) gives the district court discretion to award costs not enumerated in § 1920.

Although *Farmer* did not involve expert witness fees, the Court noted with approval that the district court denied the excess costs because they were not indispensable to the litigation and had not received prior court approval, which might have kept the costs to a minimum or alerted the parties in advance that they would be taxable.[65] These two considerations—indispensability and prior court approval—have been taken as guidelines by those circuits that permit courts the discretion to tax expert witness fees under Rule 54(d).

The First Circuit has permitted the discretionary award of expert witness fees for courtroom testimony, noting that an express finding that the testimony was indispensable is usually required, but that prior court approval will suffice.[66] Indeed, the First Circuit's leading case reversed an award of attorney's fees under the *Alyeska* standards at the same time that it upheld an award of expert witness fees under *Farmer.*[67]

The Third Circuit, in the maritime tort case of *Roberts v. S.S. Kyriakoula O. Lemos,*[68] expressly permitted the

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[64] *Id.* at 235, 85 S.Ct. at 416.

[65] *Id.* at 233-35, 85 S.Ct. at 415-16.

[66] *Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982); *see also Templeman v. Chris Craft Corp.*, 770 F.2d 245 (1st Cir. 1985) (employment discrimination); *Heddinger v. Ashford Memorial Community Hospital*, 734 F.2d 81 (1st Cir. 1984) (diversity).

[67] *See Gradmann & Holler GMBH v. Continental Lines, S.A.*, 679 F.2d 272, 274 (1st Cir. 1982).

[68] 651 F.2d 201 (3d Cir. 1981).

award of expert witness fees "when the expert's testimony is indispensable to the determination of the case," or "played a crucial role in the resolution of the issues presented." [69] The court wrote:

> While *Farmer* commands perhaps a tight-fisted exercise of discretion in order to insure moderation in the cost of litigation, it does not mandate parsimony to the extent of precluding recovery of legitimate and indispensable litigation expenditures.[70]

Our own circuit has permitted expert witness fees to be awarded not only under § 1988,[71] but in cases of bad faith litigation,[72] and when, after prior court approval, the testimony proved indispensable to the determination of the case.[73]

The Sixth Circuit has affirmed an award of expert witness fees in a civil rights case, rejecting the argument that such fees were expenses incidental to § 1988 attorney's fees, and awarding them instead "pursuant to the court's sound discretion under" § 1920 and Rule 54(d).[74] The

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[69] *Id.* at 206.

[70] *Id.*

[71] *Berry v. McLemore*, 670 F.2d 30, 34 (5th Cir. 1982); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir. 1981).

[72] *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 441 F.2d 631, 637 (5th Cir.), *cert. denied*, 404 U.S. 941, 92 S.Ct. 285, 30 L.Ed.2d 255 (1971). *But see Baum v. United States*, 432 F.2d 85 (5th Cir. 1970) (Rule 54(d) discretion limited to statutory witness fees); *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963); *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962) (no discretion to award expert witness fees).

[73] *Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1100 (5th Cir. 1982) (Clayton Act).

[74] *Northcross v. Board of Ed. of Memphis City Schools*, 611 F.2d 624, 640 (6th Cir. 1979); *see also Smillie v. Park Chemical Co.*, 710 F.2d 271 (6th Cir. 1983) (SEC action); *but see Murphy v. International Union of Operating Engineers*, 774 F.2d 114 (6th Cir. 1985) (LMRDA action).

district court had reduced the amount allowed to one-half the amount claimed because the expense had been incurred without prior approval of the court and was excessive.

The Eighth Circuit, like the Third, has permitted the award of expert witness fees adopting *Farmer* guidelines.[75] Although it did so in an antitrust case arising under the Clayton Act, the court relied only on *Farmer*, holding that "Fed. R. Civ. P. 54 authorizes district judges to award costs not specifically enumerated in 28 U.S.C. § 1821 [or §1920]." It has reached the same result in cases that do not involve a fee-shifting statute.[76]

The Ninth Circuit permits the award of expert witness fees if the testimony is necessary to the case and the fees are reasonable. In *Thornberry v. Delta Airlines, Inc.*, it describes the court's authority to award these costs as limited to "special circumstances." However, it interprets these circumstances broadly, considering "the reasonable needs of the party in the context of the litigation." [77] While *Thornberry* was a civil rights case, to which § 1988 was applicable, the court relied only upon Rule 54(d).

The District of Columbia Circuit has found no authority for a court to award excess expert witness fees but

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[75] *Paschall v. Kansas City Star Co.*, 695 F.2d 322, 338-39 (8th Cir. 1982), *rev'd on other grounds en banc*, 727 F.2d 692, *cert. denied*, —— U.S. ——, 105 S.Ct. 222 (1984); *see also Hiegel v. Hill*, 771 F.2d 358 (8th Cir. 1985) (§ 1983); *Easley v. Anheuser-Busch, Inc.*, 758 F.2d 251 (8th Cir. 1985) (§ 1983); *Coleman v. Omaha*, 714 F.2d 804, 809 (8th Cir. 1983) (employment discrimination); *Linneman Construction, Inc. v. Montana-Dakota Utilities Co., Inc.*, 504 F.2d 1365 (8th Cir. 1974).

[76] *Nemmers v. City of Dubuque*, 764 F.2d 502, 506 (8th Cir. 1985) (zoning action). *See also Nebraska Public Power Dist. v. Austin Power, Inc.*, 773 F.2d 960 (8th Cir. 1985) (diversity).

[77] 676 F.2d 1240, 1245 (9th Cir. 1982), *vacated on other grounds*, 461 U.S. 952, —— S.Ct. ——, —— L.Ed.2d —— (1983); *see also Shakey's Inc. v. Covalt*, 704 F.2d 426 (9th Cir. 1983) (trademark infringement). *But see Twentieth Century Fox Film Corp. v. Goldwyn*, 328 F.2d 190, 224 & n.67 (9th Cir. 1964).

qualified this rule by an exception "if the district court approves in advance or requires the testimony of a specially qualified witness who will furnish information or evidence not otherwise reasonably accessible to the court and whose appearance is determined to be critically important to the case." [78]

Other circuits have denied the award of expert witness fees in excess of the amount allowed ordinary witnesses by 28 U.S.C. § 1821.[79] The Second [80] and Fourth [81] Circuits have addressed the issue only in antitrust cases and have held, I believe incorrectly, that the Clayton Act's allowance of "cost of suit" does not permit awards in excess of § 1920 costs. The Seventh Circuit recognizes that courts "retain some discretion to tax costs not specifically provided for by statute," citing *Farmer*, but limits that discretion to unspecified "exceptional circumstances." [82] Finally, the Tenth [83] and Eleventh [84] Circuits

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[78] *Quy v. Air America, Inc.*, 667 F.2d 1059, 1066 n.11 (D.C. Cir. 1981) (diversity); *See also Moore v. National Association of Securities Dealers, Inc.*, 762 F.2d 1093, 1128 n.20 (D.C. Cir. 1985) (employment discrimination); *Postow v. OBA Federal Savings & Loan Ass'n*, 627 F.2d 1370 (C.A.D.C. 1980) (Truth in Lending Act).

[79] *See* Bartell, *supra* note 5, at 591.

[80] *Berkey v. Eastman Kodak*, 603 F.2d 263 (1974), *cert. denied*, 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980); *Trans World Airlines v. Hughes*, 449 F.2d 51, 81 (2d Cir. 1971).

[81] *Speciality Equipment & Machinery Corp. v. Zell Motor Car Co.*, 193 F.2d 515, 520-21 (4th Cir. 1952).

[82] *Illinois v. Sangama Construction Co.*, 657 F.2d 855, 865 n.14 (7th Cir. 1981); *see also Sanchez v. Schwartz*, 688 F.2d 503 (7th Cir. 1982) (§ 1988); *Adams v. Carlson*, 521 F.2d 168 (7th Cir. 1975) (prisoner's suit); *Fey v. Walston & Co.*, 493 F.2d 1036 (7th Cir. 1974) (SEC action).

[83] *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979) (diversity); *but see Ramos v. Lamm*, 713 F.2d 546 (10th Cir. 1983) (awarding expert witness fees under § 1988 as incidental expense).

[84] *Loughan v. Firestone Tire & Rubber Co.*, 749 F.2d 1519 (11th Cir. 1985). *Kivi v. Nationwide Mutual Insurance Co.*, 695 F.2d 1285, 1289 (11th Cir. 1983). *But see Dowdell v. City of Apopka, Fla.*, 698 F.2d 1181, 1188-89 (11th Cir. 1983) (awarding all out-of-pocket expenses under § 1988).

have categorically denied district courts the discretionary authority to award witness fees in excess of the amounts specified in § 1821, although they have not extended this limitation to § 1988 cases.

In sum six circuits permit the award of expert witness fees when the testimony is indispensable or when advance court approval is obtained, in accordance with the Supreme Court's dictum in *Farmer*, and as we have held in prior cases. Two circuits categorically deny district courts any authority under the Clayton Act, and two deny them any authority under Rule 54(d), to award costs not provided for by statute. But none engrafts the *Alyeska* attorneys'-fee exceptions onto a rewritten § 1920.

Pursuant to Rule 54(d), the district court should be permitted in its discretion, sparingly exercised, to award a prevailing party expert witness fees, reasonable in amount, for courtroom testimony in cases in which the testimony was indispensable to resolution of the case. District courts should be given discretion to adopt local rules limiting the award of such fees to cases in which prior court approval was given.

VII.

In *Gibbons*, the district court carefully reviewed the evolving law in our circuit, and in the Third, Sixth, and Eighth Circuits before concluding, as do I, and as did those circuits, that *Farmer* has modified what remains of *Henkel*, and that expert witness fees in excess of those allowed by statute may be awarded if they were indispensable to the litigation. The district court noted that, "It is particularly appropriate to award defendants the costs of indispensable expert witness testimony under the circumstances of this case, where the defendants were

forced to defend an extremely burdensome, vexatious, and totally meritless array of antitrust claims." [85] It carefully reviewed the importance of the testimony of each of the three expert witnesses whose fees were sought to be taxed and concluded that the testimony of only two was "crucial and indispensable to the presentation of the defendants' case." It also examined the reasonableness of the fees of those two witnesses before ordering that they be taxed. The *Gibbons* court applied the right test and, in a carefully reasoned exercise of its discretion, reached a result that I would affirm.

VIII.

The costs of litigation, as we all know, have become staggering. A plaintiff may put a defendant or a defendant may put a plaintiff to a tremendous amount of expense, apart from the cost of obtaining an attorney's services, in defending or prosecuting a case. One cause of this expense is the unavoidable necessity of expert witness testimony to establish or rebut many legal claims, especially those raised in civil rights and antitrust cases. A study cited by a student writer suggests that expert testimony controls the outcome in two-thirds of all cases, and that expert witness fees are second only to attorney's fees as the largest litigation expense.[86]

A rule that denies a prevailing party who is entitled to attorney's fees the right to recover the other costs for which his lawyer bills him gives the vindicated party only half a victory. Although the victor in litigation is not entitled to spoils, he ought at least be able to invoke the court's discretion to make him whole.

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[85] *J.T. Gibbons v. Crawford Fitting Co.*, 102 F.R.D. 73, 83 (E.D. La. 1984).

[86] *See* Note, Contingent Fees for Expert Witnesses in Civil Litigation, 86 Yale L.J. 1680, 1680 n.1, 1681 n.4 (1977).

APPENDIX E

1. Federal Rules of Civil Procedure, Rule 54(d) provides:

Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

2. 28 U.S.C. Section 1920 provides:

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

3. 28 U.S.C. Section 1821 provides:

(a)(1) Except as otherwise provided by law, witness in attendance at any court of the United States, or before a United States Magistrate, or before any person authorized

to take his deposition pursuant to any rule or order of a court of the United States, shall be paid the fees and allowances provided by this section.

(2) As used in this section, the term "court of the United States" includes, in addition to the courts listed in section 451 of this title, any court created by Act of congress in a territory which is invested with any jurisdiction of a district court of the United States.

(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance.

(c) (1) A witness who travels by common carrier shall be paid for the actual expenses of travel on the basis of the means of transportation reasonably utilized and the distance necessarily traveled to and from such witness's residence by the shortest practical route in going to and returning from the place of attendance. Such a witness shall utilize a common carrier. A recipt of other evidence of actual cost shall be furnished.

(2) A travel allowance equal to the mileage allowance which the Administrator of General Services has prescribed, pursuant to section 5704 of title 5, for official travel of employees of the Federal Government shall be paid to each witness who travels by privately owned vehicle. Computation of mileage under this paragraph shall be made on the basis of a uniformed table of distances adopted by the Administrator of General Services.

(3) Toll charges for toll roads, bridges, tunnels, and ferries, taxicab fares between places of lodging and carrier terminals, and parking fees (upon presentation of a valid parking receipt), shall be paid in full to a witness incurring such expenses.

(4) All normal travel expenses within and outside the judicial district shall be taxable as costs pursuant to section 1920 of this title.

(d) (1) A subsistence allowance shall be paid to a witness (other than a witness who is incarcerated) when an overnight stay is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day.

(2) A subsistence allowance for a witness shall be paid in an amount not to exceed the maximum per diem allowance prescribed by the Administrator of General Services, pursuant to section 5702(a) of title 5, for official travel in the area of attendance by employees of the Federal Government.

(3) A subsistence allowance for a witness attending in an area designated by the Administrator of General Services as a high-cost area shall be paid in an amount not to exceed the maximum actual subsistence allowance prescribed by the Administrator, pursuant to section 5702(c)(B) of title 5, for official travel in such area by employees of the Federal Government.

(4) When a witness is detained pursuant to section 3149 of title 18 for want of security for his appearance, he shall be entitled for each day of detention when not in attendance at court, in addition to his subsistence, to the daily attendance fee provided by subsection (b) of this section.

(e) An alien who has been paroled into the United States for prosecution, pursuant to section 212(d)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(5), or an alien who either has admitted belonging to a class of aliens who are deportable or has been determined pursuant to section 242(b) of such Act (8 U.S.C. 1252(b)) to be deportable, shall be ineligible to receive the fees or allowances provided by this section.